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# ELOQUENCE

OF

## THE UNITED STATES:

COMPILED

BY E. B. WILLISTON.

3426.

IN FIVE VOLUMES.

VOL. IV.

MIDDLETOWN, CONN.

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*Clerk of the District of Connecticut.*

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*Clerk of the District of Connecticut.*



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INAUGURAL ADDRESS  
OF  
JOHN QUINCY ADAMS,  
PRESIDENT OF THE UNITED STATES.

DELIVERED MARCH 4, 1825.



IN compliance with an usage, coeval with the existence of our federal constitution, and sanctioned by the example of my predecessors, in the career upon which I am about to enter, I appear, my fellow-citizens, in your presence, and in that of heaven, to bind myself by the solemnity of religious obligation, to the faithful performance of the duties allotted to me in the station to which I have been called.

In unfolding to my countrymen the principles by which I shall be governed, in the fulfilment of those duties, my first resort will be to that constitution, which I shall swear, to the best of my ability, to preserve, protect and defend. That revered instrument enumerates the powers and prescribes the duties of the executive magistrate; and, in its first words, declares the purposes to which these, and the whole action of the government, instituted by it, should be invariably and sacredly devoted: to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to the people of this union, in their successive generations. Since the adoption of this social compact, one of these generations has passed away. It is the work of our forefathers. Administered by some of its most eminent men, who contributed to its formation, through a most eventful period in the annals of the world, and through all the

vicissitudes of peace and war, incidental to the condition of associated man, it has not disappointed the hopes and aspirations of those illustrious benefactors of their age and nation. It has promoted the lasting welfare of that country so dear to us all; it has, to an extent far beyond the ordinary lot of humanity, secured the freedom and happiness of this people. We now receive it as a precious inheritance from those to whom we are indebted for its establishment, doubly bound by the examples which they have left us, and by the blessings which we have enjoyed, as the fruits of their labors, to transmit the same, unimpaired, to the succeeding generation.

In the compass of thirty-six years since this great national covenant was instituted, a body of laws, enacted under its authority, and in conformity with its provisions, has unfolded its powers, and carried into practical operation its effective energies. Subordinate departments have distributed the executive functions in their various relations to foreign affairs, to the revenue and expenditures, and to the military force of the union, by land and sea. A co-ordinate department of the judiciary has expounded the constitution and the laws; settling, in harmonious coincidence with the legislative will, numerous weighty questions of construction, which the imperfection of human language had rendered unavoidable. The year of jubilee, since the first formation of our union, has just elapsed; that of the declaration of our independence, is at hand. The consummation of both was effected by this constitution.

Since that period, a population of four millions has multiplied to twelve; a territory bounded by the Mississippi, has been extended from sea to sea; new states have been admitted to the union, in numbers equal to those of the first confederation; treaties of peace, amity and commerce, have been concluded with the principal dominions of the earth; the people of other nations, inhabitants of regions acquired, not by conquest, but by compact, have been united with



us in the participation of our rights and duties, of our burdens and blessings; the forest has fallen by the axe of our woodsmen; the soil has been made to teem by the tillage of our farmers; our commerce has whitened every ocean; the dominion of every man over physical nature has been extended by the invention of our artists; liberty and law have marched hand in hand; all the purposes of human association have been accomplished as effectively as under any other government on the globe; and at a cost little exceeding, in a whole generation, the expenditure of other nations in a single year.

Such is the unexaggerated picture of our condition, under a constitution founded upon the republican principle of equal rights. To admit that this picture has its shades, is but to say, that it is still the condition of men upon earth. From evil, physical, moral and political, it is not our claim to be exempt. We have suffered, sometimes by the visitation of heaven, through disease; often, by the wrongs and injustice of other nations, even to the extremities of war; and lastly, by dissensions among ourselves—dissensions, perhaps, inseparable from the enjoyment of freedom, but which have, more than once, appeared to threaten the dissolution of the union, and, with it, the overthrow of all the enjoyments of our present lot, and all our earthly hopes of the future. The causes of these dissensions have been various: founded upon differences of speculation in the theory of republican government; upon conflicting views of policy, in our relations with foreign nations; upon jealousies of partial and sectional interests, aggravated by prejudices and prepossessions which strangers to each other are ever apt to entertain.

It is a source of gratification and of encouragement to me, to observe that the great result of this experiment, upon the theory of human rights, has, at the close of that generation by which it was formed, been crowned with success, equal to the most sanguine expectations of its founders. Union, justice, tranquillity

ty, the common defence, the general welfare, and the blessings of liberty, all have been promoted by the government under which we have lived. Standing at this point of time; looking back to that generation which has gone by, and forward to that which is advancing, we may, at once, indulge in grateful exultation, and in cheering hope. From the experience of the past, we derive instructive lessons for the future. Of the two great political parties which have divided the opinions and feelings of our country, the candid and the just will now admit, that both have contributed splendid talents, spotless integrity, ardent patriotism, and disinterested sacrifices, to the formation and administration of this government; and that both have required a liberal indulgence for a portion of human infirmity and error. The revolutionary wars of Europe, commencing precisely at the moment when the government of the United States first went into operation under this constitution, excited a collision of sentiments and of sympathies which kindled all the passions, and embittered the conflict of parties, till the nation was involved in war, and the union was shaken to its centre.

This time of trial embraced a period of five and twenty years, during which, the policy of the union in its relations with Europe, constituted the principal basis of our political divisions, and the most arduous part of the action of our federal government. With the catastrophe in which the wars of the French revolution terminated, and our own subsequent peace with Great Britain, this baneful weed of party strife was uprooted. From that time, no difference of principle, connected either with the theory of government, or with our intercourse with foreign nations, has existed or been called forth, in force sufficient to sustain a continued combination of parties, or to give more than wholesome animation to the public sentiment or legislative debate. Our political creed is without a dissenting voice that can be heard. That the will of the people is the source, and the happiness of the peo-



ple the end, of all legitimate government upon earth—that the best security for the beneficence and the best guarantee against the abuse of power, consists in the freedom, the purity and the frequency of popular elections—that the general government of the union, and the separate governments of the states, are all sovereignties of limited powers; fellow-servants of the same masters; uncontrolled within their respective spheres; uncontrollable by encroachments upon each other—that the firmest security of peace is the preparation, during peace, of the defences of war—that a rigorous economy and accountability of public expenditures, should guard against the aggravation, and alleviate, when possible, the burden of taxation—that the military should be kept in strict subordination to the civil power—that the freedom of the press and of religious opinion should be inviolate—that the policy of our country is peace, and the ark of our salvation, union, are articles of faith upon which we are all now agreed. If there have been those who doubted whether a confederated representative democracy were a government competent to the wise and orderly management of the common concerns of a mighty nation, those doubts have been dispelled. If there have been projects of partial confederacies to be erected on the ruins of the union, they have been scattered to the winds: if there have been dangerous attachments to one foreign nation and antipathies against another, they have been extinguished. Ten years of peace, at home and abroad, have assuaged the animosities of political contention, and blended into harmony the most discordant elements of public opinion. There still remains one effort of magnanimity, one sacrifice of prejudice and passion, to be made by the individuals throughout the nation, who have heretofore followed the standards of political party. It is that of discarding every remnant of rancor against each other; of embracing, as countrymen and friends, and of yielding to talents and virtue alone, that confidence which.

in times of contention for principle, was bestowed only upon those who wore the badge of party communion.

The collisions of party spirit, which originated in speculative opinions, or in different views of administrative policy, are, in their nature, transitory. Those which are founded on geographical divisions, adverse interests of soil, climate and modes of domestic life, are more permanent, and therefore perhaps more dangerous. It is this which gives inestimable value to the character of our government, at once federal and national. It holds out to us a perpetual admonition to preserve alike, and with equal anxiety, the rights of each individual state in its own government, and the rights of the whole nation in that of the union. Whatsoever is of domestic concernment, unconnected with the other members of the union, or with foreign lands, belongs exclusively to the administration of the state governments. Whatsoever directly involves the rights and interests of the federative fraternity, or of foreign powers, is of the resort of this general government. The duties of both are obvious in the general principle, though sometimes perplexed with difficulties in the detail. To respect the rights of the state governments, is the inviolable duty of that of the union; the government of every state will feel its own obligation to respect and preserve the rights of the whole. The prejudices, everywhere too commonly entertained against distant strangers, are worn away, and the jealousies of jarring interests are allayed by the composition and functions of the great national councils, annually assembled from all quarters of the union at this place. Here the distinguished men from every section of our country, while meeting to deliberate upon the great interests of those by whom they are deputed, learn to estimate the talents, and do justice to the virtues of each other. The harmony of the nation is promoted, and the whole union is knit together, by the sentiments of mutual respect, the habits of social



intercourse, and the ties of personal friendship, formed between the representatives of its several parts, in the performance of their service at this metropolis.

Passing from this general review of the purpose and injunctions of the federal constitution and their results, as indicating the first traces of the path of duty in the discharge of my public trust, I turn to the administration of my immediate predecessor, as the second. It has passed away in a period of profound peace; how much to the satisfaction of our country, and to the honor of our country's name, is known to you all. The great features of its policy, in general concurrence with the will of the legislature, have been—to cherish peace, while preparing for defensive war; to yield exact justice to other nations, and maintain the rights of our own; to cherish the principles of freedom and of equal rights, wherever they were proclaimed; to discharge, with all possible promptitude, the national debt; to reduce, within the narrowest limits of efficiency, the military force; to improve the organization and discipline of the army; to provide and sustain a school of military science; to extend equal protection to all the great interests of the nation; to promote the civilization of the Indian tribes; and to proceed in the great system of internal improvements, within the limits of the constitutional power of the union. Under the pledge of these promises, made by that eminent citizen, at the time of his first induction into this office, in his career of eight years, the internal taxes have been repealed; sixty millions of the public debt have been discharged; provision has been made for the comfort and relief of the aged and indigent among the surviving warriors of the revolution; the regular armed force has been reduced and its constitution revised and perfected; the accountability for the expenditure of public moneys has been made more effective; the Floridas have been peaceably acquired, and our boundary has been extended to the Pacific ocean; the independence of the southern nations of this hemisphere has been recognized and recommended by example and by

counsel, to the potentates of Europe; progress has been made in the defence of the country, by fortifications, and the increase of the navy towards the effectual suppression of the African traffic in slaves; in alluring the aboriginal hunters of our land to the cultivation of the soil and of the mind; in exploring the interior regions of the union; and in preparing, by scientific researches and surveys, for the further application of our national resources to the internal improvement of our country.

In this brief outline of the promise and performance of my immediate predecessor, the line of duty, for his successor, is clearly delineated. To pursue, to their consummation, those purposes of improvement in our common condition, instituted or recommended by him, will embrace the whole sphere of my obligations. To the topic of internal improvement, emphatically urged by him at his inauguration, I recur with peculiar satisfaction. It is that from which I am convinced that the unborn millions of our posterity, who are, in future ages, to people this continent, will derive their most fervent gratitude to the founders of the union; that, in which the beneficent action of its government will be most deeply felt and acknowledged. The magnificence and splendor of their public works are among the imperishable glories of the ancient republics. The roads and aqueducts of Rome have been the admiration of all after ages, and have survived thousands of years, after all her conquests have been swallowed up in despotism, or become the spoil of barbarians. Some diversity of opinion has prevailed with regard to the powers of Congress for legislation upon objects of this nature. The most respectful deference is due to doubts originating in pure patriotism, and sustained by venerated authority. But nearly twenty years have passed since the construction of the first national road was commenced. The authority for its construction was then unquestioned. To how many thousands of our countrymen has it proved a benefit? To what single individual has it ever proved an injury? Re-



peated liberal and candid discussions in the legislature have conciliated the sentiments, and proximated the opinions of enlightened minds, upon the question of constitutional power. I cannot but hope, that by the same process of friendly, patient and persevering deliberation, all constitutional objections will ultimately be removed. The extent and limitation of the powers of the general government, in relation to this transcendently important interest, will be settled and acknowledged, to the common satisfaction of all, and every speculative scruple will be solved by a practical public blessing.

Fellow-citizens, you are acquainted with the peculiar circumstances of the recent election, which have resulted in affording me the opportunity of addressing you, at this time. You have heard the exposition of the principles which will direct me in the fulfilment of the high and solemn trust imposed upon me in this station. Less possessed of your confidence in advance, than any of my predecessors, I am deeply conscious of the prospect that I shall stand, more and oftener, in need of your indulgence. Intentions, upright and pure; a heart devoted to the welfare of our country, and the unceasing application of all the faculties allotted to me, to her service, are all the pledges that I can give, for the faithful performance of the arduous duties I am to undertake. To the guidance of the legislative councils; to the assistance of the executive and subordinate departments; to the friendly co-operation of the respective state governments; to the candid and liberal support of the people, so far as it may be deserved by honest industry and zeal, I shall look for whatever success may attend my public service: and knowing, that, except the Lord keep the city, the watchman waketh but in vain; with fervent supplications for his favor, to his overruling Providence I commit, with humble but fearless confidence, my own fate, and the future destinies of my country.

## SPEECH OF JOHN M. BERRIEN,

DELIVERED

IN THE SENATE OF THE UNITED STATES, MARCH, 1826,

On the following Resolution : “ *Resolved*, That it is not expedient, at this time, for the United States to send any ministers to the Congress of the American Nations assembled at Panama.



I HAVE a hope, Mr. President, perhaps it is a vain one, that I may have strength enough to state to the senate, the views which I entertain on this subject. I cannot consent to give a silent vote, on a question so deeply interesting to this union, and, especially, in some of its aspects, to my immediate constituents. Nor am I willing, pressed as we have been, by the steadily moving phalanx of our opponents, to the final decision of this controversy, to ask from their courtesy an indulgence, which they would be unwilling to accord. No, sir ; I prefer, even in my weakness, at once to mingle in the strife, and, struggling with the debility arising from bodily indisposition, and with the difficulties which belong to the subject, I will seek support, and I will find it, in the strength of the feeling which animates me.

I am, moreover, entirely sensible of the disadvantage at which I must necessarily address the senate, at this late stage of the discussion, when the attention has been wearied, not merely by the continued contemplation of the same subject, but by views and illustrations of that subject, for the most part, necessarily similar, and tending to conduct the hearer to the same result. With two exceptions, for which I take this occasion to offer my individual acknowledgments, it has seemed good to those who differ from us, to preserve the dignity of silence. We have conjured them to give to us the benefit of those profound and comprehensive



views, which have trained their minds to a conclusion, in which they repose, alike free from apprehension, and inaccessible to argument. By all those considerations which bind us to each other, we have entreated them to mingle their counsels with ours, on this interesting occasion; to impart to us a portion of that light, by the brightness of which they can tread, fearlessly, a path, that, to our less enlightened view, seems beset with dangers. They have been deaf to our supplications. Our entreaties have passed by them as the idle wind, which they regard not. Walking, themselves, by the light of faith, which is the evidence of things unseen, they will not stretch forth a hand to withdraw us from the ways of the error which they impute to us. Sir, we might imitate this example. We, too, might advance in silence to the destiny which seems to await us, in the consummation of this ill-fated project. For myself, I will not do it. "Whether men will hear, or whether they will not hear, is not strictly my personal concern; but my intention no man taketh from me." Repressing the suggestions of pride, I will remember only that we have a common interest in the result of our common counsels, and even in the little interval, that separates the moment which is, from that which shall mark the registry, to which we are summoned, I will still expostulate with our opponents, in a spirit alike free from arrogance and from servility—in the spirit of truth, and of soberness.

Sir, the measure to which we are called, is distinguished by a novelty, which induces me to pause. So far as the project is disclosed, it is plainly injurious to the best interests of this people, while much of it is veiled from the view of the most scrutinizing inquiry. Clouds and darkness rest upon it. It comes, sir, in such a questionable shape, that I will speak to it. Under the guise of a just sensibility to the interests of the Spanish American republics, it proposes to change the whole system of our foreign relations, by the mere exercise of the appointing power; to involve the interests of this union in a foreign association, composed

of states with whom we have no natural connexion, and over whose councils we can exercise no efficient control.

More distinctly, sir, and in the first place. In a season of unexampled prosperity, which we have attained by a rapidity of march, to which history affords no parallel, which invites to no change in the general system of our foreign relations, "and least of all to such change as this would bring us," we are required to abandon the wise and salutary policy which has hitherto conducted us in safety, to form a political association with the republics of Spanish America.

I should waste the time of the senate, if I were to detain you by the formal proof of the fact, that the United States are, at this moment, in the enjoyment of an unexampled prosperity. I appeal to the message of the President at the opening of the session, for the evidences of our prosperous and happy condition, of the flourishing state of our finances, of the increase of our commerce, our wealth, our population, and the extent of our territory; and for the proof that we are permitted to enjoy these bounties of Providence in peace and tranquillity; in peace with all the nations of the earth, in tranquillity among ourselves.

What are the duties which these considerations inculcate? I propose the question in sober sadness to the majority of this House. Thus situated, what is it that we owe to the republic? Is it to embark in quest of novelty on the ocean of experiment; to yield ourselves to the visionary and fantastic schemes of political projectors; to the splendid, but delusive suggestions of a wild and reckless ambition? Is it not rather to preserve, to cherish, to guard with more than vestal vigilance, that enlarged and liberal, but stable and self-dependent system of policy, which, by the blessing of God, has conducted us to our present happy and prosperous condition? What is that policy? Sir, it is the policy which guided the councils of Washington; which produced the celebrated proclamation of neutrality, a measure which saved us from



the vortex of European contention; to which each successive administration has adhered with fidelity; which Washington himself thus emphatically announced: "The great rule of conduct for us, in regard to foreign nations, is, in extending our commercial relations, to have with them as little political connexion as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop."

The proposition which I am endeavoring to illustrate, asserts merely, that the proposed mission to Panama, involves an abandonment of the policy, by which this confederation has hitherto been governed, at a time when, by a steady adherence to that policy, we are prosperous and happy. It is of the character of the measure in this view alone, that I speak at this moment. To the motives which are urged to induce its adoption, it will be my duty hereafter to advert. Here it is sufficient to recognize these facts, that the proposed association of American nations at Panama, is a political one, and that such an association is a departure from the settled policy of this government. That such is the character of the association, is not denied by those who advocate the measure, is proclaimed in every page of the documents before us, and if to the brief remark which I have made, it is necessary to add any thing to prove, that the policy of this government is such as I have represented it, I refer myself to the argument of the gentleman from New York, with whom I concur generally, in the view which he has taken of this distinctive feature, in the political history of this union.

Standing on an elevated position, in an attitude which has secured to us the respect and admiration of the world; having attained this elevation, by preserving an entire freedom of action, and by the rapid developement of our own resources, what is it that should tempt us to descend from our high estate, to mingle in diplomatic intrigues, and to make ourselves parties to international confederacies, on this or the oth-

er side of the Atlantic? Especially it is most obvious to inquire, what is the character of that association, of which we are about to become a part, by approving this nomination? Sir, it is not a mere diplomatic council. It is an international assembly, created by treaties, and invested with powers, which are efficient for the purposes of its institution, some, and the principal of which are belligerent. An association with such a Congress, must necessarily commit our neutrality.

The general argument on these propositions, has been pressed with so much perspicuity and force by gentlemen who have preceded me; they have gone into such fulness of detail, that I do not propose to tax the patience of the senate, by a renewed discussion of the whole question. There are two points connected with it, however, on which I desire to be heard.

In the first place, I ask the attention of the senate to this remark.

Whatever declarations may be made to the contrary, however foreign it may be from the intention of the President, it will be the necessary consequence of this mission, that we shall become parties to the Congress of Panama, to the extent of what is denominated the pledge of Mr. Monroe, or we must disappoint the expectations, and excite the resentments of the Spanish American States. This proposition includes these ideas:

That the Spanish American states consider this government as pledged to them, to resist the interference of any European power, in the war which they are waging for their independence, by force of the official declarations of Mr. Monroe, and the subsequent acts of our administration.

That it is one, and a principal and distinctly avowed object of the proposed Congress at Panama, to concert the means by which effect is to be given to this, our system of policy.

That the assent of the senate, the remaining branch of the treaty-making power, is alone wanting to com-



mit the national faith, however the forms of the constitution may require other agencies for its redemption.

That a failure to realize these expectations must be productive of feelings of coldness and ill-will.

Let us examine the two first in connexion. Does any gentleman doubt what is the view taken of this declaration, by the republics of Spanish America, or that they consider it to be one of the subjects of the deliberations of the Congress at Panama, in which we are to participate? On both these points, the minister of the United States of Mexico, is clear and explicit. He expresses himself thus: "The government of the subscriber never supposed nor desired that the United States of America would take part in the Congress about to be held, in other matters than those which, from their nature and importance, the late administration pointed out and characterized as being of general interest to this continent." This is the strongest mode of expressing both the expectation and the desire of the Mexican government, that the United States would take part in the Congress, in those matters which had been so characterized and pointed out. The minister proceeds: "For which reason, (that is, because the late administration had pointed it out, as of general interest to the continent,) one of the subjects which will occupy the attention of the Congress, will be the resistance or opposition to the interference of any neutral nation, in the question and war of independence, between the new powers of the continent and Spain." Here is the idea in bold relief, a distinct assertion, that resistance to the interference of any European power, in the war between Spain and those states, is a question of general interest to the continent, this government included: that it has been expressly so characterized by the late administration, and that it is one of those subjects to be discussed in that Congress, in which we are expected to participate. But how participate? By our counsels, merely? No, sir. Being, as this minister asserts we are, "of accord, (with them,) as to resistance," we are,

in that Congress, to "discuss the means of giving to that resistance all possible force," which, he adds, is only to be accomplished, "by a previous concert as to the mode in which each shall lend its co-operation." The minister of Colombia is equally decisive on this point. He speaks of this subject as one to be discussed in the Congress, and one of great importance; suggests the propriety of a treaty in relation to it, to remain secret until the *casus fœderis* should happen, and adds, "This is a matter of immediate utility to the American states that are at war with Spain, and is in accordance with the repeated declarations and protests of the cabinet at Washington." To this discussion, and this treaty, he manifestly expects that we are to become parties.

Is it not, then, obvious, that these invitations have been given by the ministers of the Spanish American states, under a perfect conviction, which is plainly and frankly expressed in the very letters of invitation, that we would participate in the deliberations of the Congress at Panama, in the resistance to be made to the interference of any neutral nation, in the question and war of independence between these states and Spain? And that, conceding the principle, that we are bound to such resistance and opposition by our own previous and repeated declarations and protests, we would proceed to concert with them in that Congress, the means of giving to that resistance the greatest possible force?

Shall we realize these expectations? We are, then, to take our seats in an international assembly, composed of deputies from five belligerent states, with instructions, I care not how restricted, to stipulate with them the terms of an eventual alliance, in the prosecution of the very war in which they are now engaged; to arrange the means of giving to our joint efforts the greatest possible force. Are gentlemen prepared to do this? Sir, this wretched bantling must one day breathe the upper air. However darkly nurtured in this political dungeon, to which the sign manual of the President, and our own too easy confidence have



consigned us, it must see the light. It must stand before the majesty of the American people. Do gentlemen believe that they are prepared to do this thing? To stake the fair and goodly heritage, to which they have succeeded, on the issue of a contest with the powers of Europe, in defence of these new republics; in defence of any other rights but their own?

If this inquiry cannot be met, will it be evaded by suggesting that the contingency is remote; that the powers of Europe will not interfere; that our association with the Spanish American States will prevent their interference? What more decisive proof can be offered, that the act proposed to us by these ministers, will be a violation of our neutrality—a wrong done to Spain? We are to deliberate with her enemies; to give them the benefit of our counsels; nay, to play the bravado in their behalf; to threaten the powers of Europe with the vengeance which awaits them, if one of them shall dare to draw a sword for Spain; and this is consistent with our “professed principles of neutrality.” Sir, if this be true, what are our principles? Are not our professions without principle?

But is the contingency remote? Will not our interference tend to accelerate it? Will no restlessness be excited in Europe, when we shall avow ourselves to be the champions of the new states? And even England, liberal as her course has been towards these states—who doubts, that it has been regulated by her commercial interests? Will she consider those interests safe, under the direction of a confederation, to the guidance of which, we make pretensions? We are her rivals in the competition for the commerce of these states. Can she deal with them in the same spirit, when we take a seat in their councils?

Give to our adversaries, *argumenti gratia*, the benefit of the suggestion. Be the contingency remote or near, it is still a contingency, on the happening of which, this government is pledged, in the view of those states, to an alliance with them, for hostile purposes. What intelligent statesman would found such a pledge on the

notion of the remoteness of the contingency, which should call for its redemption? Take the instance referred to, by the gentleman from New York ; who would have expected, at the time the contract was entered into, that we should have been called to the fulfilment of our guaranty to France ?

Pause to consider, for a moment, the question of the remoteness or propinquity of this contingency. Brazil yet bows beneath the imperial sway. The glitter of her diadem is offensive to the Spanish American republics. The Liberator pants to finish the great work, to which he thinks he is called—the emancipation of a continent. Ere long, the arms of the confederacy will press upon Brazil. Will Portugal slumber ? Will she not be forced by circumstances to become the ally of Spain ? Will not the contingency then have arrived ? And Great Britain, always the friend and guardian of Portugal, will she be indifferent to the cries of her ancient and faithful ally ? Hitherto, the Spanish American republics have been contending for the right of self-government, and mankind have been forced to feel the justice of their cause. The war against Brazil will have a different character. The object will be to impose their own form of government, on a neighboring people. In this state of things, will the united claims of Spain and of Portugal, find no allowance from the other nations of Europe ? If these contingencies should happen, will the people of these states be willing to embark in the contest ?

Will it be said, that whatever might have been the character of this “celebrated pledge,” it has become inoperative, by the force of intervening circumstances—that Spain is in a state of exhaustion—that the war for Spanish American independence, no longer exists in fact ? I answer, in its original terms, it did not contemplate opposition to Spain acting alone, but to Spain acting by the aid of an European ally. Her exhausted condition does not therefore, remove, the pledge. But do the Spanish American States, consider it at an end ? Why then have they called upon us, to stipulate the



terms of its redemption, in the Congress of Panama? Does our own government consider it at an end? Why then have they so recently acted upon it, at the call of the United States of Mexico.

If this difficulty can neither be met nor evaded, will gentlemen resort to the universal *nostrum*, the great political *panacea*, confidence in the executive? Sir, on this subject of confidence, I am willing to deal justly; nay, as far as I am personally concerned, liberally. But I stand here, as one of the representatives of a sovereign state, charged to watch over her interests, and to the best of my poor ability, to defend them; enjoined to decide according to the rule of evidence, and not the rule of faith. Besides, I protest that the concession of confidence here, is purely gratuitous—absolutely without consideration. There is an entire want of reciprocal confidence. What is the evidence, on which you were called to decide one of the most important questions ever presented to an American senate? Did it consist in a frank disclosure of the facts, necessary to inform your judgment? Was it that evidence, on which your judgment was ultimately founded? And how was that evidence extorted, but by repeated calls of this House? As the constitutional advisers of the President, were we deemed unworthy of his whole confidence? If so, are we prepared to yield ours?

But, sir, this concession of confidence would not only be gratuitous; it would be also against the plainest and most palpable evidence.

We have seen what is the view entertained by the Spanish American ministers, of this “celebrated pledge” of resistance to European interference, in the question and war of their independence. Now, if we are required to confide implicitly in the President, to protect us against these pretensions, we must look to his declarations, not merely to us, but to those ministers; not merely to what he has said, but to what he has omitted to say, when the occasion required him to speak; not to his acts and declarations alone.

but to the acts and declarations of his authorized agents, either expressly or tacitly approved, to ascertain if there is a sufficient basis on which to rest this confidence.

I grant you, sir, the President has told us, that the motive of the attendance of our ministers at the Congress of Panama, is neither to contract alliances, nor to engage in any undertaking, or project, importing hostility to any nation. But is this the plain import of the invitation given to him? Is this the obvious result of his acceptance of that invitation? These ministers, too, tell us, that we are not to be required to do any thing which may commit our neutrality, but they tell us, in the same breath, that we are expected to do that, which must commit our neutrality.

We are not to be required to commit our neutrality. No, sir. But we are expected to stipulate a contingent alliance with these states, against Spain, and any other European power, which may interfere in the pending war. Is not this to commit our neutrality? How has the President met this pretension? Has he repelled it? No, sir. The ministers of those states assert, that the stipulation of the terms of this contingent alliance, is a subject of "common interest;" that it is of "immediate utility" to those states; that it is expected our representatives will have "express instructions in their credentials" on this point. These assertions called upon the President to speak out. Did he meet and repel this pretension? Sir, this would have justified our confidence. Was he silent? Then he abandoned us. There is a silence, which is as impressive and as binding as any language. He has been little observant of diplomatic correspondence, who has not perceived with what studied care, pretensions which it is not intended to admit, even although they may relate to subjects entirely collateral, are stated and repelled.

But the President was not silent, and he did not repel this pretension. On the contrary, the secretary of state, acting under his immediate eye, distinctly affirm-



ed it. The ministers of those republics tell him that this question, of the mode of resistance to European interference, will arise before this Congress; that it is a question of common interest to the nations of America; that it is expected, that our ministers will have express instructions, on this point, in their credentials; and, without denying, and thereby admitting, the truth of these assertions, and the reasonableness of this expectation, the secretary answers, that our commissioners "will be fully empowered and instructed, on all questions likely to arise in the Congress, on subjects, in which the nations of America have a common interest. Can it be doubted, then, that the Spanish American states have a right to expect that our ministers will be instructed to act upon the subject of resistance to European interference, and to concert with them, the means of giving to our combined resistance, the utmost possible force?"

When, therefore, I am required to act upon faith, in the spirit of unlimited confidence, I say, the occasion does not authorize it—the evidence forbids it. When I am told, that the President will not commit our neutrality, I answer, that he has already manifested his determination to put it to the hazard of events. I appeal from the President, to the President; from what he has said to us, to what he has said to these ministers, and to what he has omitted to say, when the occasion required him to speak, and to speak plainly. But this is not the whole case.

The declarations of our minister to Mexico, place this subject beyond all controversy. He asserts it, even more broadly than the Spanish American ministers themselves, more strongly than consistently with a just pride, with a proper degree of self-respect, they could have asserted it. According to these declarations, if any European power shall interfere in the pending war between Spain and these states, we are not only to fly to their aid, to make common cause with them, in the struggle, but we are, yes, sir, we are to bear the brunt of the contest. Now, I ask you,

sir, do you, does any man believe, that the American people understand this thing, or that understanding, they will submit to it? If this be true, the blood and treasure of this people, aye, our own blood and treasure are to be freely spent in defence of Spanish American liberty. We are to be their champions, if need be, against Europe in arms.

Under what circumstances is this declaration made? Is it to manifest our "profound sensibility" to the welfare of these new republics? No, sir. It is made in the spirit of a cold and calculating policy, for the advancement of our own interests, with little idea that we should be called to fulfil it—a huckstering bargain, to secure certain advantages in a commercial treaty.

Does any one pretend, I have not heard it suggested here, that these declarations of our minister at Mexico, were unauthorized by the President? The answer is obvious. Such an assertion would itself be unauthorized. Whether we look to the character of the minister, or to the evidence before us, the same conclusion is forced upon us. I deny the title of any man to credit, who shall assert the contrary, on the documents before us. The fact that such a declaration had been made, was distinctly communicated to the secretary of state. Was the minister rebuked for it? Was the pledge disavowed? Was he instructed to recall it? No, sir. His conduct was approved. He remains at this moment in the same important station, enjoying the full confidence of the government.

Will any profound examiner of dates assert, that there is no evidence of this approbation; that the letter of Mr. Clay to Mr. Poinsett, of the 9th of November, 1825, is not an answer to that from Mr. Poinsett, in which he informs the secretary, that he had made this declaration to the Mexican government? Sir, I concede the fact; but how will it avail our opponents? Certainly this letter was answered before the 16th of January, 1826, when the documents referred to were communicated to the senate. If, in that answer, the conduct of Mr. Poinsett was disapproved, why has it



not been produced to us? If the President has not given to it his sanction, why has he not told us so? It would be quite as easy as to make the general declaration, that the proposed mission is not intended to commit our neutrality, in the face of evidence which, in our view, incontestably proves the reverse. But could the conduct of Mr. Poinsett have been disapproved? In the letter from Mr. Clay, of which I have just spoken, after inveighing against the inconsistency of the Mexican government, in a spirit of indignation, he exclaims: "No longer than about three months ago, when an invasion by France, of the island of Cuba, was believed at Mexico, the United Mexican government promptly called upon the government of the United States, through you, to fulfil the memorable pledge of the President of the United States, in his message to Congress, of December, 1823. What they would have done, had the contingency happened, may be inferred from a despatch to the American minister at Paris, a copy of which is herewith sent, which you are authorized to read to the plenipotentiaries of the United Mexican States." Here, then, is a distinct avowal, by the secretary himself, of the existence of a pledge on the part of this government, which authorized the assertion of Mr. Poinsett—not of a mere declaration of policy, which the United States were free to pursue or abandon, but of a pledge, which they were bound to redeem; which the Mexican government had recently, through that very minister, called upon them to redeem, and which they had been willing, if the occasion had required it, to redeem; and, to prove to the Mexican government their willingness to have done so, Mr. Poinsett was furnished with the necessary evidence, which he was authorized to exhibit to the plenipotentiaries of that government. This chronological discovery cannot, therefore, avail.

But perhaps it will be said, this was only an argument made use of by our minister, a mere diplomatic movement, in the progress of the negotiation. Before we yield to this profound suggestion, let us consider,

that the value of the argument, depends on the truth of the fact which it asserts. Let us remark, too, to what a condition our cabinet would be reduced, by the indiscreet zeal of its friends. If, in their view, the fact be untrue, the assertion of it, as the foundation of an argument to induce the Mexican government to do the act required of them, was an imposture, which the executive of the United States has not disavowed, and which he has, therefore, adopted. But he is not liable to this imputation. If there be truth in evidence, he admits the existence of this pledge, so far as a President of the United States is competent to give it.

With what reason, then, do gentlemen call upon us to give our sanction to this nomination, in faith and confidence that the executive will not commit our neutrality, in the face of this manifest determination on his part, to say the least of it, to commit that neutrality to the hazard of events, to chain our destinies to the car of Spanish American fortune; to make the peace and quiet of this people, to depend on the councils of any single cabinet in Europe, whose chief may think fit to draw his sword, in the assertion of the divine right of Spain?

But does this pledge exist? Is this government bound by a contract so disastrous? If it be so, *fides servanda est*. But, I deny the fact. I deny that this celebrated pledge, as the secretary has denominated it, has any existence but in the imagination of the visionary. Let us, for a moment, examine it. If genuine, it will bear inspection. It is described by the secretary, as the memorable pledge of the President of the United States, in his message to Congress of December, 1823. Now the President had no authority, by his own act alone, to pledge the United States to a foreign power. He did not intend to do so. It was a mere declaration of the policy, which, under given circumstances, he believed it proper for the United States to pursue. It did not bind him. It did not bind Congress. They declined to respond to it. No foreign



power could demand the enforcement of it, because no foreign power was party to it. If, when the crisis arrived, the President and Congress, for the time being, should take the same view of the policy of the United States, the principle of this declaration would be acted upon. If otherwise, it would be abandoned. The notion of a pledge, is visionary. That implies a contract, an agreement, on consideration. Here was a mere gratuitous declaration to Congress, of one of the public functionaries of this government, which never received the sanction of that body.

Last year I was told in the court below, that the United States had given a pledge to the nations of the world, for the suppression of the slave trade. I denied the existence of such a pledge, and the doctrine was not acknowledged by that tribunal. The answer was obvious. That could not be a pledge which the United States might capriciously withdraw. It was a rule prescribed for the conduct of our own citizens, under the solemnity of an act of Congress indeed, but which another act of Congress might repeal, and the pledge was gone. The pledge of which we are now speaking had not even the sanction of an act of Congress, nor of either branch of the legislature. Hitherto, then, we are free to act. We are bound by no pledge. But the President of the United States has proclaimed a principle of policy, on the basis of which the new powers have given us an invitation to this Congress, the chief and avowed object of which is to concert the means of giving effect to this principle, by the combined exertions of the American states, this government included. If the senate advise its acceptance, is not the faith of the United States committed? The power to give effect to the principle, will indeed depend on the ratification of a treaty by two thirds of the senate, and the provisions of that treaty can only be called into active operation by the whole force of the legislative power. But if either be withheld, will not the public faith be violated? If yielded, will not the peace of this union be put in jeopardy, and made

to depend on events, with which it has no natural connexion, and over which it can exercise no efficient control? Can you refuse, without disappointing the just expectations of the Spanish American states—expectations which this government has created, and which it has distinctly and expressly recognized in its negotiations with these states? Of such a conduct, the inevitable result must be feelings of resentment and indignation, which will not be the less strong, because, peradventure, in obedience to the suggestions of policy, they may for a time be suppressed.

Sir, this is not the only belligerent question which we must discuss in the Congress of Panama. The second remark which I have to make on this branch of the subject, is this: if we do go there, our own interests will imperiously demand, that we should share in those deliberations which are to determine the fate of Cuba and Puerto Rico; and this is a question which we cannot safely commit to negotiation.

The original message of the President, which called us to the exercise of our advisory duties, left us wholly without information on this subject. When the additional documents, for which we had asked, were furnished, it became obvious, that the fate of these islands was to be decided in the Congress of Panama, so far as the Spanish American states had power to decide it. This state of things at once demanded our most earnest and serious attention.

When we look to the situation of those islands; to the commanding position which they occupy, with reference to the commerce of the West Indies; we cannot be indifferent to the change of their condition. But when we reflect that they are in juxtaposition, to a portion of this union, where slavery exists; that the proposed change is to be effected by a people, whose fundamental maxim it is, that he who would tolerate slavery is unworthy to be free; that the principle of universal emancipation must march in the van of the invading force; and that all the horrors of a servile war will too surely follow in its train; these merely commer-



cial considerations, sink into insignificance; they are swallowed up, in the magnitude of the danger with which we are menaced.

Sir, under such circumstances, the question to be determined is this: with a due regard to the safety of the southern states, can you suffer these islands to pass into the hands of buccaneers, drunk with their new born liberty?

I repeat the question—can you suffer this thing, consistently with the duty which you owe to Maryland, to Virginia, to Kentucky, to Missouri, to Tennessee, to North and South Carolina, to Georgia, to Alabama, to Mississippi, to Louisiana, and to Florida? Nay, sir, New England, securely as she feels on this subject, is not without interest in the result. A numerous colony of her sons, are, at this moment, toiling in temporary exile, beneath the fervid sun of Cuba. If the horrors of St. Domingo are to be reacted in that beautiful island, they will be its first victims.

What then is our obvious policy? Cuba and Puerto Rico, must remain as they are. To Europe, the President has distinctly said, “we cannot allow a transfer of Cuba to any European power.” We must hold a language equally decisive to the Spanish American States. We cannot allow their principle of universal emancipation to be called into activity, in a situation where its contagion, “from our neighborhood, would be dangerous to our quiet and safety.” The President would brave the power of England, to prevent her acquisition of Cuba; and why, sir? To keep the receipts of our custom-house at their maximum; to preserve our commerce and navigation. Will he quail before the new republics of the south, when a dearer interest is at stake?

I know, sir, the documents before us prove it; that we have been exhibiting the character of a political busybody, in the cabinets of Europe and America. I know, sir, the documents before us prove it; that in the progress of this splendid diplomatic campaign, certain declarations have been made to the different

powers, cis-atlantic and trans-atlantic, which it may be difficult to reconcile. But, so far as they conflict with the duty which we owe to ourselves, they must be reconciled. The safety of the southern portion of this union, must not be sacrificed to a passion for diplomacy. The United States are yet free from these diplomatic fetters. They are not pledged. We have entered into no bonds. If it shall consist with our interest that Cuba should pass into the hands of England or of France, rather than to see another Haytien republic erected there, we are free to permit it. If our interests, and our safety, shall require us to say to these new republics; Cuba and Puerto Rico must remain as they are, we are free to say it. Yes, sir, and by the blessing of God, and the strength of our own arms, to enforce the declaration. And let me say to gentlemen, these high considerations do require it. The vital interests of the south demand it; and the United States will be recreant from its duty, faithless to the protection which it owes to the fairest portion of this union, if it does not make this declaration, and enforce it.

Shall we go to Panama to do this? It is one of the thick-coming fancies which bewilder the minds of the advocates of this measure, that it will tend to protect the interests of the southern states; that their interests require that we should send ministers to Panama to discuss this question concerning Cuba and Puerto Rico—yes, sir, unfettered as our cabinet is by its pledges and declarations, that we should commit to the hazard of negotiation, a question of vital interest to us, in relation to which we have nothing to yield.

The deputies of the Spanish American republics go to Panama with the settled conviction, that they have the right to strike at Spain, by inciting and aiding Cuba and Puerto Rico to revolt; and, although they will not ask us to join in the operation, they will expect us to consult with them as to the relations to be maintained with this new power. Unless we are faithless to ourselves, our deputies must be instructed that no



change in the condition of these islands can be permitted. What benefit can you expect from such negotiations?

Our deputies will be told—the cabinet at Washington have recognized our right to strike our enemy, wherever we can reach him. They have expressly disclaimed their right to interfere to prevent us from attacking Cuba. At their instance, we have suspended this movement until the result of their mediation with Russia was ascertained. In requesting a mere suspension, they have reiterated the admission of our right. We have performed an act of courtesy in yielding to this request, but the period of suspension has passed. We return to our original purpose, and you cannot consistently interfere with its execution.

Sir, we must cut this Gordian knot. We must relieve ourselves from these diplomatic fetters. We must pledge ourselves, not to foreign nations, but to that portion of our own citizens, who have a deep and vital interest in this question, that the condition of Cuba and Puerto Rico shall remain unchanged. To the Spanish American states we must notify our determination, in terms of perfect respect and good-will, but still as our fixed determination. Shall we go to Panama to do this? To expose our deputies to their reproaches for our imputed inconsistency? Or to insult them by a studied mockery in opening a negotiation, with a fixed determination to dictate the terms, with an entire conviction that we have nothing to yield to them? Sir, on such a subject, the will of the people of the United States should be expressed, through their representatives in both Houses of Congress, by an act to invest the President with the powers which will be adequate to the crisis.

These, sir, are the reflections which occur to me on this branch of the subject. To my mind, it is obvious, however we may protest against any intention to violate our neutrality, that, as a necessary consequence of this mission, we must become parties to the Congress of Panama, to the extent of what is denomi-

nated the pledge given by Mr. Monroe—a pledge which the people of the United States are not prepared to admit, and to redeem—a pledge, the redemption of which would most distinctly commit our neutrality; or, refusing to do so, that we shall disappoint the expectations which we ourselves will have created, and feelings of ill-will, and of eventual hostility, must be the necessary result.

And that, even if we do go to Panama, we must share in their deliberations concerning Cuba and Puerto Rico—deliberations involving interests which we cannot commit to negotiation—in relation to which we have nothing to yield—concerning which, the obvious course of our policy is simply to notify the determination, which a just regard to our own vital interests has compelled us to adopt, and having notified it, if need be, to prepare to enforce it.

Sir, these considerations press upon me, with a force which is not to be resisted. But they are not the only objections to this measure. The character of the proposed Congress is undefined. Before we commit our destinies to its influence, we ought to understand it. Its objects are understood differently by those who have given and by those who have accepted this invitation. Instructions which will conform to the views of the former, will be dangerous to the best interests of this republic. Restricted within the limits suggested by the latter, they will be deficient in good faith—will disappoint the just expectations of those with whom we are about to associate, and cannot fail to substitute feelings of coldness and ill-will, tending to hostility, for those which now connect us with the republics of Spanish America. Thus, even in its peaceful aspect, this Congress tends to controversy rather than to conciliation.

It is not my purpose to dwell in detail on these latter suggestions. Unquestionably it is our duty to understand the character of this Congress, with which we are about to associate. From the chaos of discordant ideas presented to us, it is necessary to extract some



definite conceptions on which the mind can repose, not with the assurance of certainty, for that is hopeless, (the President and secretary have vainly endeavored to obtain it,) but in the belief that we have reached a reasonable probability. Before we become parties to this Congress, it is manifestly proper that we should understand—

Its constituents and the principle of its organization.

Its forms of proceeding and modes of action.

The effect and obligation of its decisions, and the process of enforcing them.

The objects of its power.

Its deviations and the means of dissolving it, or those by which any member may retire from the confederacy.

I do not intend to discuss these various subjects. They would furnish materials for a volume, and cannot be examined within the limits necessarily prescribed to this debate. I propose merely to touch them—briefly to explain the difficulties which oppress me, in the hope, perhaps it is a vain one, that gentlemen, who see their way clearly, will deign to assist us in their solution. Will they allow me to ask these questions?

Are the ministers to this Congress to negotiate separately and successively with each other, or collectively, and contemporaneously in one general assembly?

If, in one general assembly, what will be the principle of its organization? Are all the members to deliberate on a footing of exact equality, or under the presidency of one or more, and of whom?

Are the ministers of the United States to become members of this general assembly, or is it to be composed exclusively of the Spanish American states, and are our ministers to go, not as members, but merely as legates to this Congress?

If they are not members, will they be allowed to take part in the deliberations of the Congress? If they are members, will they be bound by its decisions

to the extent that other states; to the extent that the Spanish American states, are bound? Is each member to be allowed to originate subjects for deliberation, or are they to be fixed by treaty, or to grow out of events? Will any one of these subjects have precedence? Or will this depend on the will of the whole Congress, or of a majority, and of what majority? Is the sense of the Congress to be expressed by resolutions or compacts? In either case, is unanimity required, or is a majority, and what majority, to govern?

It is a more fearful inquiry to ascertain the effect and obligation of the decisions of this Congress, and the process of enforcing them. Are these decisions to be recommendatory merely, or are they to have any other, and what force and effect? Do they become obligatory by the mere act of this assembly, *proprio vigore*, or are they to be transmitted to the several powers, by their agents, for the assent and ratification of such powers? If the former, whence do we derive the right to commit the interests of the people of the United States to such guardianship? If the latter, if they are to be considered a body of diplomatists, whose acts are inefficient, until they have received the sanction of their respective cabinets, in what, but to our disadvantage, will the Congress of Panama differ from the Congress of diplomatists here, who negotiate separately, but immediately with our cabinet? What are those questions affecting our interests, which can be more conveniently adjusted at Panama, than at Washington?

If there is a middle term; if the decisions of this Congress, though not binding, are yet to come, as they must come, with the high authority imparted to them by this assembly of nations; with the special sanction of our own ministers, will no danger result from the refusal to ratify them by the senate of the United States? Shall we be considered as fit members of an association, whose views are so dissimilar from our own? Sir, I ask gentlemen to consider how extremely probable it is, that this diversity will occur, when



they advert to the condition and character of these states, and compare it with our own. I ask them to look a little further.

When the pacts or resolutions of this Congress, establishing, for example, any principle of international law, shall have received the sanction of the respective powers, how are they to be enforced? If one of the members of the confederacy shall fall off from the rule, is the force of the remaining members to be employed to coerce the return of the delinquent? Is this force to be moral or physical? Is it to be moral—is the delinquent to be put under the ban of the confederacy—to lose caste—to be excommunicated—to be the object of a political anathema? Is it to be physical, supported by fleets and armies, and all the pomp and circumstance of glorious war?

Or, (it is the only remaining alternative,) is the confederacy to acknowledge the impotency of its stipulations, by passively witnessing this delinquency?

But what are the objects on which the powers of this Congress are to be exercised; in the exercise of which we are expected to participate? I have spoken of the great and chief object; that which the ministers of those states have placed in the front rank, the redemption of what our own cabinet has denominated the celebrated pledge of Mr. Monroe. I have spoken also of Cuba. I pass over the proposed resistance to colonization. The absurdity of going to Panama for the purpose of entering into stipulations on this subject, has, I think, been sufficiently exposed. But this Congress is to be a council in great conflicts, a rallying point in common dangers, a faithful interpreter of public treaties, an umpire, an arbitrator, a conciliator, in all disputes and differences.

Is the exercise of these high powers to be confined to the Spanish American states? It is provided for, by treaties to which we are not parties. But can we become parties to the Congress, without, in effect, submitting to the jurisdiction which it asserts over the

other members of the confederacy? Let us consider this question briefly, but with care.

The minister of Colombia tells us, the subjects for discussion in the Congress, "constitute two classes:

First. Matters peculiarly and exclusively concerning the belligerents.

Second. Matters between the belligerents and neutrals."

An expectation that we should join in the last, is distinctly expressed. Among the matters which belong to the second class, are enumerated, those of which I have already spoken, and some others. The minister from Mexico adds, that after these subjects shall have been disposed of, our representatives are to "be occupied upon others to which the existence of the new states will give rise," by which is to be understood those principles of international law adverted to by the President of the United States.

Now let us suppose that on any one of these subjects, the Congress shall come to a determination which shall receive the sanction of the respective states who are represented there. The result will be a treaty made in the Congress of Panama, and ratified by the respective cabinets. If, then, in consequence of any stipulation in that treaty, a controversy should arise between the confederated states and any foreign power, is not the United States necessarily a party to such controversy? The Congress is to be a council in great conflicts. Has not the *casus fœderis* occurred? It is to be a rallying point in common dangers. Is not this a common danger?

Suppose the confederated states to differ as to the interpretation of the treaty, is not the jurisdiction of the Congress undeniable? It is the faithful interpreter of treaties. If Mexico and Colombia are the disputants, will it not decide between them? Who will decide? The Congress. We are parties to the Congress, parties to the treaty; shall we not partake in the decision? Will the case be varied by changing the parties? If the dispute be between the United



States of America and the United States of Mexico, will not the jurisdiction of the Congress be equally clear? We are both members of the Congress, both parties to the treaty; what shall exempt us from its authority? I do not speak of the obligation of its decision, but of its right to interpret.

Say that we are nominally exempt. Can we be substantially so? Admit, for the purpose of the argument, that, not being parties to the conventions by which this Congress was called into existence, we can successfully plead to its jurisdiction, as an interpreter of treaties, made by its agency, so far as we are parties. What then? The Spanish American states are parties to the treaty, concerning the interpretation of which we differ. They are entitled, under their conventions, to resort to the Congress in which it was made, as its faithful interpreter. They claim the decision, and it is rendered. Shall we respect the decision of our associates, although not bound to do so by treaty? Shall we yield to it? The authority of the Congress is acknowledged; shall we resist it? Shall we insist on a different rule of interpretation? And what then is the attitude in which we stand to this confederacy of nations? Can we continue to be represented in a Congress whose authority we have spurned? Will we, ought we, to be permitted to be parties in negotiations resulting in treaties, which we reserve to ourselves an independent right to interpret, while our associates submit to them the decision of a common tribunal?

Sir, we too must submit to the decisions of this Congress, if we are represented there. Can this arrangement be advantageous to us? Will it be tolerated by the people of the United States? What is there common to us, and to those new republics, but the mere form of our governments? For the rest, do they not differ from us in every particular, in language, religion, laws, manners, customs, habits, as a mass and as individuals? Are not their interests, in many respects, different from ours?

As between the several Spanish American states, all these things are in common. They have, moreover, a common origin. They have escaped from a common oppression. They are struggling against a common danger, and have, necessarily, in many respects, a common interest. By negotiating with them jointly, we increase their comparative strength, and diminish our own. In submitting any dispute, which we may have with one of these states, to the arbitrament of the remainder, are we tried by our peers? Have we even the benefit of a jury, *de medietate linguæ*?

I would advert, only for a moment, to the power proposed to be exercised, in this Congress, for the suppression of the slave trade, in reference to which I make this remark: if the deliberate opinion expressed by a very large majority of the senate at the last session of Congress, in the rejection of a treaty with Colombia, having for its object the inhibition of this traffic, by the joint exertions of the two republics—a treaty, too, that had been negotiated in precise conformity with the instructions of our own cabinet, could have availed aught with the President of the United States; he would, so far as we are concerned, have distinctly excluded this from the subjects of consideration by the Congress of Panama. I know not how gentlemen, who voted against that treaty, can recommend the unqualified acceptance of this invitation, when one of its avowed objects is the suppression of the slave trade, by the energetic, general and uniform co-operation of all the American States. That, however, is a subject for their consideration. For myself I abhor the slave trade. It is abhorred by my constituents. Even at the moment when it was tolerated by our laws, it was not in the southern portion of this union that its practical advocates were found. But I cannot admit, so far as I have the power to avert it, the interference of any foreign nation in the action of this government, or its own citizens.

The proposal to submit to the determination of



this Congress the question on what bases the relations of Hayti, and other parts of our hemisphere, that shall hereafter be in like circumstances, are to be placed, is one of the most odious features in the invitation which we are considering. It assumes the fact, I beg you to remark it, sir, that these relations are to exist. The Congress to which we are invited, is only to determine their bases, to define their character.

The revolted slaves of St. Domingo, who, although years have passed away since they broke their fetters, have recently afforded the most decisive evidence of their incapacity for freedom, in the servility of the tenure by which they have agreed to hold, from their ancient taskmasters; the slaves of Cuba and Puerto Rico, who are to be stimulated to revolt, by our Spanish American brethren, in the prosecution of their war against Spain; aye, and the slaves of the British West India islands, if, with the aid of their own abolition society, they can be tempted to successful insurrection, (sir, the idea is no creature of my imagination,) and "other parts of our hemisphere that may be in like circumstances;" that is, under the government of revolted slaves, are to hold certain relations to us, the people of the United States, especially to us, the people of the southern United States, the basis of which is to be determined, the character of which is to be defined, by the Congress of Panama. Yes, sir, and so far from repudiating from this project, this odious and alarming feature, our own cabinet has accepted this invitation, in the spirit of diplomatic courtesy, "to manifest the sensibility of the United States to whatever concerns the prosperity of the American hemisphere," but in utter recklessness of the condition of a portion of the people of this union. To that people, sir, I speak in the sadness of my heart, indeed, but in the calm and deliberate exercise of my judgment. The intercourse which would result from such relations, would be productive of the most awful calamity, would introduce a moral contagion, compared with which,

physical pestilence, in the utmost imaginable degree of its horrors, would be light and insignificant. I will not trust myself on this subject. It is too intimately associated with feelings which I cannot, which I do not desire to control.

Shall we go to Panama to avert these evils? The affirmative of this proposition, asserted on this floor, is entitled to grave consideration, because of the source from which it emanates. It may, however, be briefly disposed of. Why go to Panama for this purpose? Is the policy, which duty and interest prescribe to us, of a doubtful character, and do we invoke the counsels of the Congress to enable us to discover it? Is it beyond the scope of our unassisted resources—and do we ask the aid of the new republics to sustain us in our efforts to accomplish it? Sir, it is a mere question of intercourse, which, as it regards Hayti and the Spanish American States, we are free to allow or to refuse; but in relation to which, unless we are faithless to our own brethren—to the people of the south, we have no option. Their interests, their safety, demand its unqualified rejection.

Do our brethren of the north differ from us as to the danger of this intercourse? Do they abstain from sympathizing with us because they cannot enter into our feelings of apprehension? Sir, ours is the post of danger. They are in comparative safety. Who, then, should decide this question? Consistently with their own safety, can the people of the south permit the intercourse which would result from establishing relations of any sort with Hayti, or other portions of our hemisphere; in like circumstances? Is the emancipated slave, his hands yet reeking in the blood of his murdered master, to be admitted into their ports, to spread the doctrines of insurrection, and to strengthen and invigorate them, by exhibiting in his own person an example of successful revolt? Gentlemen must be sensible that this cannot be. The great principle of self-preservation will be arrayed against it. I have been educated in sentiments of habitual reverence for



the constitution of the United States. I have been taught to consider the union of these states as essential to their safety. The feeling is nowhere more universal or more strong than among the people of the south. But they have a stronger feeling. Need I name it? Is there any one who hears and does not understand me? Let me implore gentlemen not to call that feeling into action by this disastrous policy.

If the mission, as its objects are stated to us by the Spanish American ministers, is thus liable to objection, the charm of the picture is not heightened by the additional touches, which it has received from the message before us. I will not detain the senate, by a detailed examination of the several subjects, which are there suggested, as proper for the consideration of the Congress at Panama. If it is to be resorted to, for the purpose of establishing principles of maritime neutrality, and principles favorable to the navigation of peace, and to commerce in time of war, it has been already shown that, so far as we have thought proper to propose these principles, they have been readily acquiesced in, by the states, with whom we have separately negotiated, or are in such a train, as to promise a successful issue. It cannot then be necessary to resort to the Congress of Panama, for the establishment of these principles; and if the motive of being represented there, is to devise means for their enforcement—if, borrowing the example of the armed association of 1780, it is intended to proclaim to the world a new code of international law, which is to be enforced by the power of the confederacy, I am not willing to enter into these bonds. Such an association might put two continents in a blaze.

Nor am I willing to send ministers to Panama, as the apostles of religious toleration; to intermeddle with the principles of their faith, or the fundamental laws, which they have deemed it wise to ordain for the preservation of the Roman Catholic church. Whatever interpretation may be given to it, this is the substance of the proposition before us. You abjure the

idea of interfering to instruct the men of other countries how to govern themselves. Will you consider less absurd the attempt to teach them in what manner to worship their God?

The establishment of the Roman Catholic religion, as exclusive in those states, is essential to their safety. Look to the character of the population; to the influence of the priests; to the noble part which they have performed in the struggle for independence. Above all, consider that this is the only remaining link, which connects these new states to continental Europe. Against the doctrines of legitimacy, and the divine right of kings, they have committed the inextinguishable crime. They have been guilty of the sin of republicanism. One only tie still connects them. It is the Roman Catholic religion. It is their acknowledgment, in the person of the sovereign pontiff, of the common head of the visible Church. Outcasts from the courts of kings, they are still within the pale of his protection. Who will say that his authority, or his counsels, may not avail, to control the obstinacy of Ferdinand, and thus to give repose to Spanish America? Is this, then, a subject on which the moral influence of our example can be justly exerted? Will it, ought it to be tolerated?

But what is to be the duration of this confederacy? It is indefinite in its terms, and its objects would render it coexistent with the states which compose it. Admit the right of any one nation to retire at will from the Congress; what will be the situation of the nation so retiring? New relations must be formed with the other states of the confederacy. Will the season be propitious to their formation? We are well with these people now. Affection may be chilled by indifference; but it is destroyed in the conflict of opposing interests. We cannot realize the expectations of the Spanish American states, in the Congress of Panama. Why should we go there merely to disappoint them?

Sir, the manner in which this mission has been got up is very liable to objection. To me it appears, that



we ourselves have invited this invitation. Having obtained it, we were a little prudish in the outset. We asked, from our intended associates, a few plain questions; to the answers to which we were certainly entitled. We did not get them, however, and, in our anxiety for the connexion, we determined to waive them. Now we were wrong, (which we certainly were not,) in making this demand originally, or we were wrong in its subsequent abandonment. Whence arose this overweening anxiety?

Sir, it is the last, certainly not the least of the objections, which I have to this measure, that it is in my view an attempt to change the foreign relations of this government, in a mode not contemplated by the constitution—by the mere exercise of the ordinary appointing power. The same authority which is exerted to create a collector of the customs, or a register of the land office, is considered sufficient to change the whole system of our foreign relations. Nay, a higher extent of prerogative is asserted. The President claims it to be exclusively within his “constitutional competency,” to send deputies to the Congress of Panama; and it is merely in consequence of an act of grace and courtesy on his part, that we are consulted in this matter. Sir, this is a lofty pretension. I am no advocate of changes in the fundamental law, but, if this claim be well founded, it behoves us to look to our charter.

By the constitution, the President is authorized to nominate, and, by and with the advice and consent of the senate, to appoint ambassadors, and other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not therein otherwise provided for, and which shall be established by law. Now, it is plain, that the appointing power does not include the power to create the office; in other words, that the office, to which the appointee is nominated, must be previously created by law. If an appointment be to an office, to be exercised within the limits of the United

States or its territories, it must be to one which exists, and has been created by the municipal laws of the United States. If to an office which is to be exercised without the limits of the United States, within the dominions of a foreign sovereign, it must be to one which exists, and is recognized by the general principles of international law, or which is specially created by positive and particular pacts and conventions. The limitation, in the latter case, results not only from the fundamental law of this government, but from the exclusive dominion, within his own territories, of the sovereign within whose territories this minister is to exercise his functions. That sovereign is bound, as a member of the great family of nations, to recognize as legitimate an appointment which is consonant to the code of international law; and, of course, to acknowledge one which, by express convention, he has stipulated; but this is the extent of his obligation, and consequently, the limit of the appointing power, under our constitution.

Let us look to the first of these propositions. Is it within the "constitutional competency" of the President to appoint to an office, the functions of which are to be exercised within the limits of the United States, which office has not been created by the laws of the United States? Take an example. The President deems it expedient to establish a home department. Is there any one sufficiently absurd to assert, that he has a right *ex mero motu*, or even with the assent of a majority of the senate, to appoint a secretary for that department—to assign to him certain specific duties, and then to call on Congress for the requisite appropriation, to compensate his services; to imagine that the acts of such an officer would be valid, or that his attestations would be respected by our judicial tribunals?

Before the passing of an act of Congress, for the organization of a newly acquired territory, and the creation by that act of the legislative, executive and judicial officers deemed necessary for its government, is it



within the "constitutional competency" of the President, aided even as before by a majority of the senate, to appoint an officer, or officers, to exercise all or either of these functions? The proposition is believed to be too clear for argument.

Within the United States, the office must be created by law, before the appointing power can be called into action. Why should a different rule prevail without? The law of nations operates on this government in its intercourse with other sovereignties, as the municipal law does in its action on its own citizens. In this case, then, the law of nations, as in the other, the municipal law, must have created the office, before the power of appointment can exist. Now the law of nations does recognize ambassadors and other ministers, in the intercourse between sovereigns. But this law does nowhere recognize the right of a Congress of ministers to receive an embassy. The right to receive, and the right to send a minister, are correlative. The one does not exist without the other. A Congress of ministers is not authorized to receive an ambassador, unless it is authorized to send one. Who will assert for the Congress of Panama, the right to exercise the latter power?

A sovereign cannot, then, be represented in a Congress of ministers, otherwise than by a deputy, who becomes a member of that Congress. He is not an ambassador to that Congress, but is himself a constituent part of it. He is not accredited to any particular power, but is commissioned as one of a number of deputies, who are collectively to compose the Congress. How are these deputies created? The answer is obvious. From the necessity of the thing, it must be, by conventions of treaties between the respective powers who are to be represented by those deputies. In this manner, the Congress at Verona was created by the treaty of Paris. The deputies who appeared there, were called into existence by the express stipulations of that treaty. So, too, in the Congress of Panama, the office of deputy to that Con-

gress, is created by the special provisions of the treaties, between the several powers who are to be represented there.

The result of what has been said is this: the office of a deputy to an international Congress, does not exist permanently under the law of nations, but is the offspring of particular convention; and this, of necessity, because the Congress itself is not pre-existing, but is the creature of treaty; and the treaty which creates the Congress, stipulates also for the appointment of the deputies of whom it is to be composed. Then the clause of the constitution, which authorizes the appointment of ambassadors, or other ministers, cannot be invoked to sustain this nomination, because a deputy to a Congress, is not a minister existing by force of the law of nations, but created by particular conventions between the powers represented in that Congress; and we have no such conventions with the powers represented in the Congress of Panama. Consequently, as to us, the office of minister or deputy to that Congress does not exist, not being derived from the law of nations, nor provided for by any convention. A very simple view of the subject seems to be decisive. Could the President have sent ministers to the Congress of Panama, uninvited by the powers represented there? Could he, without such invitation, have required such ministers to be accredited by that Congress? Would a refusal to receive them have furnished just ground of complaint? If these questions are answered in the negative, as I presume they must be, the conclusion is obvious, the office exists only by force of the invitation.

Unless, then, the mere invitation of a foreign nation is competent to create an office, and thus to call into action the appointing power of the President, or unless this appointing power includes the power to create the office which we have seen that it does not, the appointment by the President of ministers to the Congress of Panama cannot be valid, nor can it be rendered so by the advice and consent of a majority of



the senate, nor by any power short of that, which is competent to create the office, and that we have seen is the treaty-making power. The President can appoint a minister to the republic of Colombia, because such an office exists under the law of nations, and is, therefore, a legitimate object of the appointing power; and he may instruct such minister to communicate with the Congress of Panama; but he cannot appoint a minister to take a seat in that Congress, because we have no conventions with the powers represented there, by which, as to us, the office is created; nor can he send a minister as an ambassador or legate to that Congress, because the Congress, as such, has not the rights of embassy. If it be said that this is mere form, the answer is obvious; form becomes substance in this case, by force of the constitutional provision which requires the assent of two thirds of the senate to the ratification of a treaty, while a bare majority is sufficient to give effect to an exercise of the appointing power.

Let us consider this question for a moment, freed from the prejudices which operate in favor of the Spanish American republics. If the states represented in the Congress of Vienna, or Verona, or the holy alliance, had given us an invitation to be represented there, apart from the expediency of the measure, would it have been within the "constitutional competency" of the President to have sent ministers to take their seats in either of those assemblies? If the nations of Europe should, by treaties, provide for a Congress to devise the means of abolishing the slave trade, of resisting the extortions of the Barbary powers, or of suppressing the piracies of the West Indian seas, would the President, the United States not being parties to those treaties, of his own mere will, make us members of that Congress, by sending deputies to represent us there? The question is proposed in this form, because our ministers would, of necessity, if received at all, be members, and not ambassadors, since

such a Congress is neither competent to send or to receive an embassy.

Why, then, in the creation of this office of deputy or minister to the Congress of Panama, was not the constitutional organ, the treaty-making power resorted to? What would have been the result of such a course, is obvious, I think, in the recorded votes of the senate, on the preliminary questions which have arisen. The object could not have been effected. The office would not have had existence, or the senate, in the exercise of their legitimate powers, would have so modified the treaty, as to have limited the functions of the ministers to those objects of which they would have approved.

Such, sir, are some of the views which I have taken of this very interesting question. I will not fatigue the senate by a recapitulation of them. They are, perhaps, erroneous. If this measure is to be adopted, I sincerely hope they may be so. Such as they are, however, they are respectfully submitted to the senate, as the result of patient inquiry, and a sincere disposition to arrive at truth. It has not been my purpose to arraign the motives which have produced this nomination; but of the measure itself, I have spoken with the freedom which I thought became me. All that remains is, that I should record my vote, and that duty I am now ready to perform.



# SPEECH OF DANIEL WEBSTER,

ON

## THE PANAMA MISSION,

DELIVERED IN THE HOUSE OF REPRESENTATIVES OF THE  
UNITED STATES, APRIL 14, 1826.\*



MR. CHAIRMAN,

I AM not ambitious of amplifying this discussion. On the contrary, it is my anxious wish to confine the debate, so far as I partake in it, to the real and material questions before us.

\* The following Resolution being under consideration, in committee of the whole House upon the state of the union, viz :

“*Resolved*, That in the opinion of the House, it is expedient to appropriate the funds necessary to enable the President of the United States to send ministers to the Congress of Panama.”

Mr. M’Lane, of Delaware, submitted the following amendment thereto, viz :

“ It being understood as the opinion of this House, that, as it has always been the settled policy of this government, in extending our commercial relations with foreign nations, to have with them as little political connexion as possible, to preserve peace, commerce, and friendship, with all nations, and to form entangling alliances with none : the ministers who may be sent shall attend at the said Congress in a diplomatic character merely ; and ought not to be authorized to discuss, consider, or consult, upon any proposition of alliance, offensive or defensive, between this country and any of the Spanish American governments, or any stipulation, compact, or declaration, binding the United States in any way, or to any extent, to resist interference from abroad, with the domestic concerns of the aforesaid governments ; or any measure which shall commit the present or future neutral rights or duties of these United States, either as may regard European nations, or between the several states of Mexico and South America : leaving the United States free to adopt, in any event which may happen, affecting the relations of the South American governments, with each other, or with foreign nations, such measures as the friendly disposition cherished by the American people towards the people of those states, and the honor and interest of this nation may require ;”

Our judgment of things is liable, doubtless, to be affected by our opinions of men. It would be affectation in me, or in any one, to claim an exemption from this possibility of bias. I can say, however, that it has been my sincere purpose to consider and discuss the present subject, with the single view of finding out what duty it devolves upon me, as a member of the House of Representatives. If any thing has diverted me from that sole aim, it has been against my intention.

I think, sir, that there are two questions, and two only, for our decision. The first is, whether the House of Representatives will assume the responsibility of withholding the ordinary appropriation, for carrying into effect an executive measure, which the executive department has constitutionally instituted? The second, whether, if it will not withhold the appropriation, it will yet take the responsibility of interposing, with its own opinions, directions or instructions, as to the manner in which this particular executive measure shall be conducted?

I am, certainly, in the negative, on both these propositions. I am neither willing to refuse the appropriation, nor am I willing to limit or restrain the discretion of the executive, beforehand, as to the manner in which it shall perform its own appropriate constitutional duties. And, sir, those of us who hold these opinions have the advantage of being on the common highway of national politics. We propose nothing new; we suggest no change; we adhere to the uniform practice of the government, as I understood it, from its origin. It is for those, on the other hand, who are

To which Mr. Rives proposed to add, after the words, "aforesaid governments," in the 12th line, the following:

"Or any compact or engagement by which the United States shall be pledged to the Spanish American States, to maintain, by force, the principle that no part of the American continent is henceforward subject to colonization by any European power."

The preceding motions to amend being under consideration, Mr. Webster delivered the following speech.



in favor of either, or both, of the propositions, to show us the cogent reasons which recommend their adoption. The duty is on them, to satisfy the House and the country that there is something in the present occasion which calls for such an extraordinary and unprecedented interference.

The President and senate have instituted a public mission, for the purpose of treating with foreign states. The constitution gives to the President the power of appointing, with the consent of the senate, ambassadors, and other public ministers. Such appointment is, therefore, a clear and unquestionable exercise of executive power. It is, indeed, less connected with the appropriate duties of this House, than almost any other executive act; because the office of a public minister is not created by any statute or law of our own government. It exists under the law of nations, and is recognized as existing by our constitution. The acts of Congress, indeed, limit the salaries of public ministers; but they do no more. Every thing else, in regard to the appointment of public ministers, their numbers, the time of their appointment, and the negotiations contemplated in such appointments, is matter for executive discretion. Every new appointment to supply vacancies in existing missions, is under the same authority. There are, indeed, what we commonly term standing missions, so known in the practice of the government, but they are not made so by any law. All missions rest on the same ground. Now the question is, whether the President and senate, having created this mission, or, in other words, having appointed the ministers, in the exercise of their undoubted constitutional power, this House will take upon itself the responsibility of defeating its objects, and rendering this exercise of executive power void?

By voting the salaries, in the ordinary way, we assume, as it seems to me, no responsibility whatever. We merely empower another branch of the government to discharge its own appropriate duties, in that

mode which seems to itself most conducive to the public interests. We are, by so voting, no more responsible for the manner in which the negotiation shall be conducted, than we are for the manner in which one of the heads of department may discharge the duties of his office.

On the other hand, if we withhold the ordinary means, we do incur a heavy responsibility. We interfere, as it seems to me, to prevent the action of the government, according to constitutional forms and provisions. It ought constantly to be remembered, that our whole power, in the case, is merely incidental. It is only because public ministers must have salaries, like other officers, and because no salaries can be paid, but by our vote, that the subject is referred to us at all. The constitution vests the power of appointment in the President and senate; the law gives to the President even the power of fixing the amount of salary, within certain limits; and the only question, here, is upon the appropriation. There is no doubt that we have the power, if we see fit to exercise it, to break up the mission, by withholding the salaries; we have power also to break up the court, by withholding the salaries of the judges, or to break up the office of President, by withholding the salary provided for it by law. All these things, it is true, we have the power to do, since we hold the keys of the treasury. But, then, can we rightfully exercise this power? The gentleman from Pennsylvania, (Mr. Buchanan,) with whom I have great pleasure in concurring on this part of the case, while I regret that I differ with him on others, has placed this question in a point of view which cannot be improved. These officers do, indeed, already exist. They are public ministers. If they were to negotiate a treaty, and the senate should ratify it, it would become a law of the land, whether we voted their salaries or not. This shows that the constitution never contemplated that the House of Representatives should act a part in originating negotiations, or concluding treaties.



I know, sir, it is a useless labor to discuss the kind of power which this House incidentally holds in these cases. Men will differ in that particular; and as the forms of public business and of the constitution are such, that the power may be exercised by this House, there will always be some, or always may be some, who feel inclined to exercise it. For myself, I feel bound not to step out of my own sphere, and neither to exercise nor control any authority, of which the constitution has intended to lodge the free and unrestrained exercise in other hands. Cases of extreme necessity, in which a regard to public safety is to be the supreme law, or rather to take place of all law, must be allowed to provide for themselves, when they arise. Reasoning, from such possible cases, will shed no light on the general path of our constitutional duty.

Mr. Chairman, I have a habitual and very sincere respect for the opinions of the gentleman from Delaware. And I can say with truth, that he is the last man in the House from whom I should have looked for this proposition of amendment, or from whom I should have expected to hear some of the reasons which he has given in its support. He says, that, in this matter, the source from which the measure springs should have no influence with us whatever. I do not comprehend this; and I cannot but think the honorable gentleman has been surprised into an expression which does not convey his meaning. This measure comes from the executive, and it is an appropriate exercise of executive power. How is it, then, that we are to consider it as entirely an open question for us; as if it were a legislative measure, originating with ourselves? In deciding whether we will enable the executive to exercise his own duties, are we to consider whether we should have exercised them in the same way ourselves? And if we differ in opinion with the President and senate, are we on that account to refuse the ordinary means? I think not, unless we mean to say, that we will exercise ourselves, all the powers of the government.

But the gentleman argues, that although, generally, such a course would not be proper, yet, in the present case, the President has especially referred the matter to our opinion; that he has thrown off, or attempted to throw off, his own constitutional responsibility; or, at least, that he proposes to divide it with us; that he requests our advice, and that we, having referred that request to the committee on foreign affairs, have now received from that committee their report thereon.

Sir, this appears to me a very mistaken view of the subject; but if it were all so—if our advice and opinion had thus been asked, it would not alter the line of our duty. We cannot take, though it were offered, any share in executive duty. We cannot divide their own proper responsibility with other branches of the government. The President cannot properly ask, and we cannot properly give our advice as to the manner in which he shall discharge his duties. He cannot shift the responsibility from himself, and we cannot assume it. Such a course, sir, would confound all that is distinct in the constitutional assignment of our respective functions. It would break down all known divisions of power, and put an end to all just responsibility. If the President were to receive directions or advice from us, in things pertaining to the duties of his own office, what becomes of his responsibility to us, and to the senate? We hold the impeaching power. We are to bring him to trial in any case of mal-administration. The senate are to judge him by the constitution and laws; and it would be singular, indeed, if, when such occasion should arise, the party accused should have the means of sheltering himself under the advice or opinions of his accusers. Nothing can be more incorrect, or more dangerous, than this pledging the House beforehand, to any opinion, as to the manner of discharging executive duties.

But, sir, I see no evidence whatever, that the President has asked us to take this measure upon ourselves, or to divide the responsibility of it with him. I see no such invitation or request. The senate hav-



ing concurred in the mission, the President has sent a message, requesting the appropriation, in the usual and common form. Another message is sent, in answer to a call of the House, communicating the correspondence, and setting forth the objects of the mission. It is contended, that by this message he asks our advice, or refers the subject to our opinion. I do not so understand it. Our concurrence, he says, by making the appropriation, is subject to our free determination. Doubtless it is so. If we determine at all, we shall determine freely; and the message does no more than leave to ourselves to decide how far we feel ourselves bound, either to support or to thwart the executive department, in the exercise of its duties. There is no message, no document, no communication to us, which asks for our concurrence, otherwise than as we shall manifest it by making the appropriation.

Undoubtedly, sir, the President would be glad to know that the measure met the approbation of the House. He must be aware, unquestionably, that all leading measures mainly depend for success on the support of Congress. Still, there is no evidence that on this occasion he has sought to throw off responsibility from himself, or that he desires of us to be answerable for any thing beyond the discharge of our own constitutional duties. I have already said, sir, that I know of no precedent for such a proceeding as the amendment proposed by the gentleman from Delaware. None which I think analogous has been cited. The resolution of the House, some years ago, on the subject of the slave trade, is a precedent the other way. A committee had reported, that, in order to put an end to the slave trade, a mutual right of search might be admitted and arranged by negotiation. But this opinion was not incorporated, as the gentleman now proposes to incorporate his amendment, into the resolution of the House. The resolution only declared, in general terms, that the President be requested to enter upon such negotiations with other powers as he

might deem expedient, for the effectual abolition of the African slave trade. It is singular enough, and may serve as an admonition on the present occasion, that a negotiation having been concluded, in conformity to the opinions expressed, not, indeed, by the House, but by the committee, the treaty, when laid before the senate, was rejected by that body.

The gentleman from Delaware himself says, that the constitutional responsibility pertains alone to the executive department: and that none other has to do with it, as a public measure. These admissions seem to me to conclude the question; because, in the first place, if the constitutional responsibility appertains alone to the President, he cannot devolve it on us, if he would; and because, in the second place, I see no proof of any intention, on his part, so to devolve it on us, even if he had the power.

Mr. Chairman: I will here take occasion, in order to prevent misapprehension; to observe, that no one is more convinced than I am, that it is the right of this House, and often its duty, to express its general opinion in regard to questions of foreign policy. Nothing, certainly, is more proper. I have concurred in such proceedings, and am ready to do so again. On those great subjects, for instance, which form the leading topics in this discussion, it is not only the right of the House to express its opinions, but I think it its duty to do so, if it should think the executive to be pursuing a general course of policy which the House itself will not ultimately approve. But that is something entirely different from the present suggestion. Here it is proposed to decide, by our vote, what shall be discussed by particular ministers, already appointed, when they shall meet the ministers of the other powers. This is not a general expression of opinion. It is a particular direction, or a special instruction. Its operation is limited to the conduct of particular men, on a particular occasion. Such a thing, sir, is wholly unprecedented in our history. When the House proceeds, in the accustomed way, by general resolution,



its sentiments apply, as far as expressed, to all public agents, and on all occasions. They apply to the whole course of policy, and must, necessarily, be felt everywhere. But if we proceed by way of direction to particular ministers, we must direct them all. In short, we must ourselves furnish, in all cases, diplomatic instructions.

We now propose to prescribe what our ministers shall discuss, and what they shall not discuss, at Panama. But there is no subject coming up for discussion at Panama, which might not also be proposed for discussion either here or at Mexico, or in the capital of Colombia. If we direct what our ministers at Panama shall or shall not say on the subject of Mr. Monroe's declaration, for example, why should we not proceed to say also what our other ministers abroad, or our secretary at home, shall say on the same subject? There is precisely the same reason for one, as for the other. The course of the House, hitherto, sir, has not been such. It has expressed its opinions, when it deemed proper to express them at all, on great leading questions, by resolution, and in a general form. These general opinions, being thus made known, have doubtless always had, and such expressions of opinion doubtless always will have, their effect. This is the practice of the government. It is a salutary practice; but if we carry it farther, or rather if we adopt a very different practice, and undertake to prescribe to our public ministers what they shall not discuss, we take upon ourselves that which, in my judgment, does not at all belong to us. I see no more propriety in our deciding now, in what manner these ministers shall discharge their duty, than there would have been in our prescribing to the President and senate what persons ought to have been appointed ministers.

An honorable member from Virginia, who spoke some days ago, (Mr. Rives,) seems to go still farther than the member from Delaware. He maintains, that we may distinguish between the various objects contemplated by the executive in the proposed negotia-

tion; and adopt some and reject others. And this high, delicate, and important trust, the gentleman deduces simply from our power to withhold the minister's salaries. The process of the gentleman's argument appears to me as singular as its conclusion. He founds himself on the legal maxim, that he who has the power to give, may annex whatever condition or qualification to the gift he chooses. This maxim, sir, would be applicable to the present case, if we were the sovereigns of the country; if all power were in our hands; if the public money were entirely our own; if our appropriation of it were mere grace and favor; and if there were no restraints upon us, but our own sovereign will and pleasure. But the argument totally forgets that we are ourselves but public agents; that our power over the treasury is but that of stewards over a trust fund; that we have nothing to give, and therefore no gifts to limit, or qualify; that it is as much our duty to appropriate to proper objects, as to withhold appropriations from such as are improper; and that is as much, and as clearly our duty to appropriate in a proper and constitutional manner, as to appropriate at all.

The same honorable member advanced another idea, in which I cannot concur. He does not admit that confidence is to be reposed in the executive, on the present occasion, because confidence, he argues, implies only, that not knowing ourselves what will be done in a given case by others, we trust to those who are to act in it, that they will act right; and as we know the course likely to be pursued in regard to this subject by the executive, confidence can have no place. This seems a singular notion of confidence; certainly it is not my notion of that confidence which the constitution requires one branch of the government to repose in another. The President is not our agent, but like ourselves the agent of the people. They have trusted to his hands the proper duties of his office: and we are not to take those duties out of his hands, from any opinion of our own that we should execute them better



ourselves. The confidence which is due from us to the executive, and from the executive to us, is not personal, but official and constitutional. It has nothing to do with individual likings or dislikings; but results from that division of power among departments, and those limitations on the authority of each, which belong to the nature and frame of our government.

It would be unfortunate, indeed, if our line of constitutional action were to vibrate, backward and forward, according to our opinions of persons, swerving this way to-day, from undue attachment, and the other way to-morrow, from distrust or dislike. This may sometimes happen from the weakness of our virtues, or the excitement of our passions; but I trust it will not be coolly recommended to us, as the rightful course of public conduct.

It is obvious to remark, Mr. Chairman, that the senate have not undertaken to give directions or instructions in this case. That body is closely connected with the President in executive measures. Its consent to these very appointments is made absolutely necessary by the constitution; yet it has not seen fit, in this or any other case, to take upon itself the responsibility of directing the mode in which the negotiations should be conducted.

For these reasons, Mr. Chairman, I am for giving no instructions, advice, or directions, in the case. I prefer leaving it where, in my judgment, the constitution has left it—to executive discretion and executive responsibility.

But, sir, I think there are other objections to the amendment. There are parts of it which I could not agree to, if it were proper to attach any such condition to our vote. As to all that part of the amendment, indeed, which asserts the neutral policy of the United States, and the inexpediency of forming alliances, no man assents to those sentiments more readily, or more sincerely, than myself. On these points, we are all agreed. Such is our opinion; such, the President assures us, in terms, is his opinion; such

we know to be the opinion of the country. If it be thought necessary to affirm opinions which no one either denies or doubts, by a resolution of the House, I shall cheerfully concur in it. But there is one part of the proposed amendment to which I could not agree, in any form. I wish to ask the gentleman from Delaware himself to reconsider it. I pray him to look at it again, and to see whether he means what it expresses or implies; for, on this occasion, I should be more gratified by seeing that the honorable gentleman himself had become sensible that he had fallen into some error, in this respect, than by seeing the vote of the House against him by any majority whatever.

That part of the amendment to which I now object, is that which requires, as a condition of the resolution before us, that the ministers "shall not be authorized to discuss, consider, or consult upon any measure which shall commit the present or future neutral rights or duties of these United States, either as may regard European nations, or between the several states of Mexico and South America."

I need hardly repeat, that this amounts to a precise instruction. It being understood that the ministers shall not be authorized to discuss particular subjects, is a mode of speech precisely equivalent to saying, provided the ministers be instructed, or the ministers being instructed, not to discuss those subjects. After all that has been said, or can be said, about this amendment being no more than a general expression of opinion, or abstract proposition, this part of it is an exact and definite instruction. It prescribes to public ministers the precise manner in which they are to conduct a public negotiation; a duty manifestly and exclusively belonging, in my judgment, to the executive, and not to us.

But if we possessed the power to give instructions, this instruction would not be proper to be given. Let us examine it. The ministers shall not "discuss, consider, or consult," &c.

Now, sir, in the first place, it is to be observed, that



they are not only not to agree to any such measure, but they are not to discuss it. If proposed to them, they are not to give reasons for declining it. Indeed, they cannot reject it; they can only say, that they are not authorized to consider it. Would it not be better, sir, to leave these agents at liberty to explain the policy of our government, fully and clearly, and to show the reasons which induce us to abstain, as far as possible, from foreign connexions, and to act, in all things, with a scrupulous regard to the duties of neutrality?

But again: they are to discuss no measure which may commit our neutral rights or duties. To commit is somewhat indefinite. May they not modify nor in any degree alter our neutral rights and duties? If not, I hardly know whether a common treaty of commerce could be negotiated; because all such treaties affect or modify, more or less, the neutral rights or duties of the parties; especially all such treaties as our habitual policy leads us to form. But I suppose the author of the amendment uses the word in a larger and higher sense. He means that the ministers shall not discuss or consider any measure which may have a tendency, in any degree, to place us in a hostile attitude towards any foreign state. And here, again, one cannot help repeating, that the injunction is, not to propose or assent to any such measure, but not to consider it; not to answer it, if proposed; not to resist it with reasons.

But, if this objection were removed, still the instruction could not properly be given. What important or leading measure is there, connected with our foreign relations, which can be adopted, without the possibility of committing us to the necessity of a hostile attitude? Any assertion of our plainest rights may, by possibility, have that effect. The author of the amendment seems to suppose that our pacific relations can never be changed, but by our own option. He seems not to be aware that other states may compel us, in defence of our own rights, to measures which, in their ultimate tendency, may commit our neutrality. Let

me ask, if the ministers of other powers, at Panama, should signify to our agents, that it was in contemplation immediately to take some measure which these agents know to be hostile to our policy, adverse to our rights, and such as we could not submit to—should they be left free to speak the sentiments of their government, to protest against the measure, and to declare that the United States would not see it carried into effect? Or, should they, as this amendment proposes, be enjoined silence, let the measure proceed, and afterwards, when, perhaps, we go to war to redress the evil, we may learn, that if our objections had been fairly and frankly stated, the step would not have been taken? Look, sir, to the very case of Cuba, the most delicate, and vastly the most important point in all our foreign relations. Do gentlemen think they exhibit skill or statesmanship, in laying such restraints as they propose on our ministers, in regard to this subject, among others? It has been made matter of complaint, that the executive has not used, already, a more decisive tone towards Mexico and Colombia, in regard to their designs on this island. Pray, sir, what tone could be taken, under these instructions? Not one word, not one single word could be said on the subject. If asked whether the United States would consent to the occupation of that island by those republics, or to its transfer by Spain to a European power; or whether we should resist such occupation or such transfer, what could they say? “That is a matter we cannot discuss, and cannot consider; it would commit our neutral relations; we are not at liberty to express the sentiments of our government on the subject: we have nothing at all to say.” Is this, sir, what gentlemen wish, or what they would recommend?

If, sir, we give these instructions, and they should be obeyed, and inconvenience or evil result, who is answerable? And I suppose it is expected they will be obeyed. Certainly it cannot be intended to give them, and not to take the responsibility of consequences, if they be followed. It cannot be intended to hold the



President answerable both ways; first, to obey our instructions, and, secondly, for having obeyed them, if evil comes from obeying them.

Sir, events may change. If we had the power to give instructions, and if these proposed instructions were proper to be given, before we arrive at our own homes, affairs may take a new direction, and the public interest require new and corresponding orders to our agents abroad.

This is said to be an extraordinary case, and, on that account, to justify our interference. If the fact were true, the consequence would not follow. If it be the exercise of a power assigned by the constitution to the executive, it can make no difference whether the occasion be common or uncommon. But, in truth, there have been much stronger cases for the interference of the House, where, nevertheless, the House has not interfered. For example; in the negotiations for peace carried on at Ghent. In that case, Congress, by both Houses, had declared war, for certain alleged causes. After the war had lasted some years, the President, with the advice of the senate, appointed ministers to treat of peace; and he gave them such instructions as he saw fit. Now, as the war was declared by Congress, and was waged to obtain certain ends, it would have been plausible to say that Congress ought to know the instructions under which peace was to be negotiated, that they might see whether the objects for which the war was declared, had been abandoned. Yet no such claim was set up. The President gave instructions, such as his judgment dictated, and neither House asserted any right of interference.

Sir, there are gentlemen in this House, opposed to this mission, who, I hope, will nevertheless consider this question of amendment on general constitutional grounds. They are gentlemen of much estimation in the community, likely, I hope, long to continue in the public service; and, I trust, they will well reflect on the effect of this amendment on the separate pow-

ers and duties of the several departments of the government.

An honorable member from Pennsylvania, (Mr. Hemphill,) has alluded to a resolution introduced by me the session before the last. I should not have referred to it myself, had he not invited the reference; but I am happy in the opportunity of showing how that resolution coincides with every thing which I say to-day. What was that resolution? When an interesting people were struggling for national existence against a barbarous despotism, when there were good hopes, (hopes, yet, I trust, to be fully realized,) of their success, and when the holy alliance had pronounced against them certain false and abominable doctrines, I moved the House to resolve—what? Simply, that provision ought to be made by law to defray the expense of an agent or commissioner to that country, whenever the President should deem it expedient to make such appointment. Did I propose any instruction to the President, or any limit on his discretion? None at all, sir; none at all. What resemblance then can be found between that resolution and this amendment? Let those who think any such resemblance exists, adopt, if they will, the words of the resolution, as a substitute for this amendment. We shall gladly take them.

I am, therefore, Mr. Chairman, against the amendment; not only as not being a proper manner of exercising any power belonging to this House; but also as not containing instructions fit to be given, if we possessed the power of giving them. And as my vote will rest on these grounds, I might terminate my remarks here: but the discussion has extended over a broader surface, and following where others have led, I will ask your indulgence to a few observations on the more general topics of the debate.

Mr. Chairman, it is our fortune to be called upon to act our part, as public men, at a most interesting era in human affairs. The short period of your life, and of mine, has been thick and crowded with the most



important events. Not only new interests and new relations have sprung up among states, but new societies, new nations and families of nations, have risen to take their places, and perform their parts, in the order and the intercourse of the world. Every man, aspiring to the character of a statesman, must endeavor to enlarge his views to meet this new state of things. He must aim at adequate comprehension, and instead of being satisfied with that narrow political sagacity, which, like the power of minute vision, sees small things accurately, but can see nothing else, he must look to the far horizon, and embrace, in his broad survey, whatever the series of recent events has brought into connexion, near or remote, with the country whose interests he studies to serve. We have seen eight states, formed out of colonies on our own continent, assume the rank of nations.

This is a mighty revolution, and when we consider what an extent of the surface of the globe they cover; through what climates they extend; what population they contain, and what new impulses they must derive from this change of government, we cannot but perceive that great effects are likely to be produced on the intercourse, and the interests of a civilized world. Indeed, it has been forcibly said, by the intelligent and distinguished statesman who conducts the foreign relations of England, that when we now speak of Europe and the world, we mean Europe and America; and that the different systems of these two portions of the globe, and their several and various interests, must be thoroughly studied and nicely balanced by the statesmen of the times.

In many respects, sir, the European and the American nations are alike. They are alike christian states, civilized states and commercial states. They have access to the same common fountains of intelligence; they all draw from those sources which belong to the whole civilized world. In knowledge and letters—in the arts of peace and war, they differ in degrees; but they bear, nevertheless, a general resemblance. On the

other hand, in matters of government and social institution, the nations on this continent are founded upon principles which never did prevail, in considerable extent, either at any other time, or in any other place. There has never been presented to the mind of man a more interesting subject of contemplation than the establishment of so many nations in America, partaking in the civilization and in the arts of the old world, but having left behind them those cumbrous institutions which had their origin in a dark and military age. Whatsoever European experience has developed favorable to the freedom and the happiness of man; whatsoever European genius has invented for his improvement or gratification; whatsoever of refinement or polish the culture of European society presents for his adoption and enjoyment, all this is offered to man in America, with the additional advantages of the full power of erecting forms of government on free and simple principles, without overturning institutions suited to times long passed, but too strongly supported, either by interests or prejudices, to be shaken without convulsions. This unprecedented state of things presents the happiest of all occasions for an attempt to establish national intercourse upon improved principles; upon principles tending to peace, and the mutual prosperity of nations. In this respect America, the whole of America, has a new career before her. If we look back on the history of Europe, we see how great a portion of the last two centuries her states have been at war for interests connected mainly with her feudal monarchies; wars for particular dynasties; wars to support or defeat particular successions; wars to enlarge or curtail the dominions of particular crowns; wars to support or to dissolve family alliances; wars, in fine, to enforce or to resist religious intolerance. What long and bloody chapters do these not fill, in the history of European politics! Who does not see, and who does not rejoice to see, that America has a glorious chance of escaping, at least, these causes of contention? Who does not



see, and who does not rejoice to see, that, on this continent, under other forms of government, we have before us the noble hope of being able, by the mere influence of civil liberty and religious toleration, to dry up these outpouring fountains of blood, and to extinguish these consuming fires of war. The general opinion of the age favors such hopes and such prospects. There is a growing disposition to treat the intercourse of nations more like the useful intercourse of friends; philosophy—just views of national advantage, good sense and the dictates of a common religion, and an increasing conviction that war is not the interest of the human race—all concur, to increase the interest created by this new accession to the list of nations.

We have heard it said, sir, that the topic of South American independence is worn out, and thread-bare. Such it may be, sir, to those who have contemplated it merely as an article of news, like the fluctuation of the markets, or the rise and fall of stocks. Such it may be, to those minds who can see no consequences following from these great events. But whoever has either understood their present importance, or can at all estimate their future influence; whoever has reflected on the new relations they introduce with other states; whoever among ourselves especially, has meditated on the new relations which we now bear to them, and the striking attitude in which we ourselves are now placed, as the oldest of the American nations, will feel that the topic can never be without interest; and will be sensible that, whether we are wise enough to perceive it or not, the establishment of South American independence will affect all nations, and ourselves perhaps more than any other, through all coming time.

But, sir, although the independence of these new states seems effectually accomplished, yet a lingering and hopeless war is kept up against them by Spain. This is greatly to be regretted by all nations. To Spain it is, as every reasonable man sees, useless, and

without hope. To the new states themselves it is burdensome and afflictive. To the commerce of neutral nations it is annoying and vexatious. There seems to be something of the pertinacity of the Spanish character in holding on in such a desperate course. It reminds us of the seventy years during which Spain resisted the independence of Holland. I think, however, that there is some reason to believe that the war approaches to its end. I believe that the measures adopted by our own government have had an effect in tending to produce that result. I understand, at least, that the question of recognition has been taken into consideration by the Spanish government; and it may be hoped that a war, which Spain finds to be so expensive, which the whole world tells her is so hopeless, and which, if continued, now threatens her with new dangers, she may, ere long, have the prudence to terminate.

Our own course during this contest between Spain and her colonies is well known. Though entirely and strictly neutral, we were in favor of early recognition. Our opinions were known to the allied sovereigns when in Congress at Aix-la-Chapelle, in 1818, at which time the affairs of Spain and her colonies were under consideration; and, probably, the knowledge of those sentiments, together with the policy adopted by England, prevented any interference by other powers at that time. Yet we have treated Spain with scrupulous delicacy. We acted on the case as one of civil war. We treated with the new governments as governments *de facto*. Not questioning the right of Spain to coerce them back to their old obedience, if she had the power, we yet held it to be our right to deal with them as with existing governments in fact, when the moment arrived at which it became apparent and manifest that the dominion of Spain over these, her ancient colonies, was at an end. Our right, our interest, and our duty, all concurred at that moment to recommend recognition—and we did recognize.

Now, sir, the history of this proposed Congress goes



back to an earlier date than that of our recognition. It commenced in 1821; and one of the treaties now before us, proposing such a meeting, that between Colombia and Chili, was concluded in July, 1822, a few months only after we had acknowledged the independence of the new states. The idea originated, doubtless, in the wish to strengthen the union among the new governments, and to promote the common cause of all, the effectual resistance to Spanish authority. As independence was at that time their leading object, it is natural to suppose that they contemplated this mode of mutual intercourse and mutual arrangement, as favorable to the necessary concentration of purpose, and of action, for the attainment of that object. But this purpose of the Congress, or this leading idea, in which it may be supposed to have originated, has led, as it seems to me, to great misapprehensions as to its true character, and great mistakes in regard to the danger to be apprehended from our sending ministers to the meeting. This meeting, sir, is a Congress—not a Congress as the word is known to our constitution and laws, for we use it in a peculiar sense; but as it is known to the law of nations. A Congress, by the law of nations, is but an appointed meeting for the settlement of affairs between different nations, in which the representatives or agents of each treat and negotiate as they are instructed by their own government. In other words, this Congress is a diplomatic meeting. We are asked to join no government—no legislature—no league—acting by votes. It is a Congress, such as those of Westphalia, of Nimeguen, of Ryswyck or of Utrecht; or such as those which have been holden in Europe in our own time. No nation is a party to any thing done in such assemblies, to which it does not expressly make itself a party. No one's rights are put at the disposition of any of the rest, or of all the rest. What ministers agree to, being afterwards duly ratified at home, binds their government; and nothing else binds the government. Whatsoever is done, to which they do not assent, neither binds the ministers

nor their government, any more than if they had not been present.

These truths, sir, seem too plain, and too common place to be stated. I find my apology only in those misapprehensions of the character of the meeting to which I have referred both now and formerly. It has been said that commercial treaties are not negotiated at such meetings. Far otherwise is the fact. Among the earliest of important stipulations made in favor of commerce and navigation, were those at Westphalia. And what we call the treaty of Utrecht, was a bundle of treaties, negotiated at that Congress; some of peace, some of boundary, and others of commerce. Again, it has been said, in order to prove that this meeting is a sort of confederacy, that such assemblies are out of the way of ordinary negotiation, and are always founded on, and provided for, by previous treaties. Pray, sir, what treaty preceded the Congress at Utrecht? and the meeting of our plenipotentiaries with those of England at Ghent, what was that but a Congress? and what treaty preceded it? It is said, again, that there is no sovereign to whom our ministers can be accredited. Let me ask whether, in the case last cited, our ministers exhibited their credentials to the mayor of Ghent? Sir, the practice of nations in these matters, is well known, and is free of difficulty. If the government be not present, agents or plenipotentiaries interchange their credentials. And when it is said that our ministers at Panama will be, not ministers, but deputies, members of a deliberative body, not protected in their public character by the public law; when all this is said, propositions are advanced, of which I see no evidence whatever, and which appear to me to be wholly without foundation.

It is contended that this Congress, by virtue of the treaties which the new states have entered into, will possess powers other than those of a diplomatic character, as between those new states themselves. If that were so, it would be unimportant to us. The real question here is, what will be our relation with



those states, by sending ministers to this Congress? Their arrangements among themselves will not affect us. Even if it were a government, like our old confederation, yet, if its members had authority to treat with us in behalf of their respective nations on subjects on which we have a right to treat, the Congress might still be a very proper occasion for such negotiations. Do gentlemen forget that the French minister was introduced to our old Congress, met it in its sessions, carried on oral discussions with it, and treated with it in behalf of the French king? All that did not make him a member of it; nor connect him at all with the relations which its members bore to each other. As he treated on the subject of carrying on the war against England, it was, doubtless, hostile towards that power; but this consequence followed from the object and nature of the stipulations, and not from the manner of the intercourse. The representatives of these South American states, it is said, will carry on belligerent councils at this Congress. Be it so; we shall not join in such councils. At the moment of invitation, our government informed the ministers of those states, that we could not make ourselves a party to the war between them and Spain, nor to councils for deliberating on the means of its further prosecution.

If, it is asked, we send ministers to a Congress composed altogether of belligerents, is it not a breach of neutrality? Certainly not: no man can say it is. Suppose, sir, that these ministers from the new states, instead of Panama, were to assemble at Bogota, where we already have a minister: their councils, at that place, might be belligerent, while the war should last with Spain. But should we, on that account, recall our minister from Bogota? The whole argument rests on this; that because, at the same time and place, the agents of the South American governments may negotiate about their own relations with each other, in regard to their common war against Spain, therefore

we cannot, at the same time and place, negotiate with them, or any of them, upon our own neutral and commercial relations. This proposition, sir, cannot be maintained; and, therefore, all the inferences from it fail.

But, sir, I see no proof that, as between themselves, the representatives of the South American states are to possess other than diplomatic powers. I refer to the treaties, which are essentially alike, and which have been often read.

With two exceptions, (which I will notice,) the articles of these treaties, describing the powers of the Congress, are substantially like those in the treaty of Paris, in 1814, providing for the Congress of Vienna. It was there stipulated that all the powers should send plenipotentiaries to Vienna, to regulate, in general Congress, the arrangements to complete the provisions of the present treaty. Now, it might have been here asked, how regulate? How regulate in general Congress?—regulate by votes? Sir, nobody asked such questions: simply because it was to be a Congress of plenipotentiaries. The two exceptions which I have mentioned, are, that this Congress is to act as a council and to interpret treaties; but there is nothing in either of these to be done which may not be done diplomatically. What is more common than diplomatic intercourse, to explain and to interpret treaties? Or what more frequent than that nations, having a common object, interchange mutual counsels and advice, through the medium of their respective ministers? To bring this matter, sir, to the test, let me ask, when these ministers assemble at Panama, can they do any thing but according to their instructions? Have they any organization, any power of action, or any rule of action common to them all? No more, sir, than the respective ministers at the Congress of Vienna. Every thing is settled by the use of the word plenipotentiary. That proves the meeting to be diplomatic, and nothing else. Who ever heard of a



plenipotentiary member of the Legislature?—a plenipotentiary Burgess of a city?—or a plenipotentiary knight of the shire?

We may dismiss all fears, sir, arising from the nature of this meeting. Our agents will go there, if they go at all, in the character of ministers, protected by the public law, negotiating only for ourselves, and not called on to violate any neutral duty of their own government. If it be so that this meeting has other powers, in consequence of other arrangements between other states, of which I see no proof, still, we are not party to these arrangements, nor can be in any way affected by them. As far as this government is concerned, nothing can be done but by negotiation, as in other cases.

It has been affirmed, that this measure, and the sentiments expressed by the executive relative to its objects, are an acknowledged departure from the neutral policy of the United States. Sir, I deny there is an acknowledged departure, or any departure at all, from the neutral policy of the country. What do we mean by our neutral policy? Not, I suppose, a blind and stupid indifference to whatever is passing around us; not a total disregard to approaching events, or approaching evils, till they meet us full in the face. Nor do we mean, by our neutral policy, that we intend never to assert our rights by force. No, sir. We mean by our policy of neutrality, that the great objects of national pursuit with us are connected with peace. We covet no provinces; we desire no conquests; we entertain no ambitious projects of aggrandizement by war. This is our policy. But it does not follow, from this, that we rely less than other nations, on our own power to vindicate our own rights. We know that the last logic of kings is also our last logic; that our own interests must be defended and maintained by our own arm; and that peace or war may not always be of our own choosing. Our neutral policy, therefore, not only justifies, but requires our anxious attention to the political events which take place in the world, a skilful

perception of their relation to our own concerns, an early anticipation of their consequences, and firm and timely assertion of what we hold to be our own rights, and our own interests. Our neutrality is not a predetermined abstinence, either from remonstrances or from force. Our neutral policy is a policy that protects neutrality, that defends neutrality, that takes up arms, if need be, for neutrality. When it is said, therefore, that this measure departs from our neutral policy, either that policy, or the measure itself, is misunderstood. It implies either that the object or the tendency of the measure is to involve us in the war of other states, which I think cannot be shown, or that the assertion of our own sentiments, on points affecting deeply our own interests, may place us in a hostile attitude with other states, and that, therefore, we depart from neutrality; whereas the truth is, that the decisive assertion, and the firm support of these sentiments, may be most essential to the maintenance of neutrality.

An honorable member from Pennsylvania thinks this Congress will bring a dark day over the United States. Doubtless, sir, it is an interesting moment in our history; but I see no great proofs of thick coming darkness. But the object of the remark seemed to be to show that the President himself saw difficulties on all sides, and making a choice of evils, preferred rather to send ministers to this Congress, than to run the risk of exciting the hostility of the states by refusing to send. In other words, the gentleman wished to prove that the President intended an alliance; although such intention is expressly disclaimed.

Much commentary has been bestowed on the letters of invitation from the ministers. I shall not go through with verbal criticisms on these letters. Their general import is plain enough. I shall not gather together small and minute quotations, taking a sentence here, a word there, and a syllable in a third place, dovetailing them into the course of remark, till the printed discourse bristles with inverted commas, in every line,



like a harvest-field. I look to the general tenor of the invitations, and I find that we are asked to take part only in such things as concern ourselves. I look still more carefully to the answers, and I see every proper caution, and proper guard. I look to the message, and I see that nothing is there contemplated, likely to involve us in other men's quarrels, or that may justly give offence to any foreign state. With this, I am satisfied.

I must now ask the indulgence of the committee to an important point in the discussion; I mean the declaration of the President in 1823. Not only as a member of the House, but as a citizen of the country, I have an anxious desire that this part of our public history should stand in its proper light. Sir, in my judgment, the country has a very high honor, connected with that occurrence, which we may maintain, or which we may sacrifice. I look upon it as a part of its treasures of reputation; and, for one, I intend to guard it.

Sir, let us recur to the important political events which led to that declaration, or accompanied it. In the fall of 1822, the allied sovereigns held their Congress at Verona. The great subject of consideration was the condition of Spain, that country then being under the government of the Cortes. The question was, whether Ferdinand should be reinstated in all his authority, by the intervention of foreign force. Russia, Prussia, France and Austria, were inclined to that measure; England dissented and protested; but the course was agreed on, and France, with the consent of these other continental powers, took the conduct of the operation into her own hands. In the spring of 1823, a French army was sent into Spain. Its success was complete. The popular government was overthrown, and Ferdinand re-established in all his power. This invasion, sir, was determined on, and undertaken, precisely on the doctrines which the allied monarchs had proclaimed the year before, at Laybach; and that is, that they had a right to interfere in the concerns of

another state, and reform its government, in order to prevent the effects of its bad example; this bad example, be it remembered, always being the example of free government. Now, sir, acting on this principle of supposed dangerous example, and having put down the example of the Cortes in Spain, it was natural to inquire with what eyes they would look on the colonies of Spain, that were following still worse examples. Would king Ferdinand and his allies be content with what had been done in Spain itself, or would he solicit their aid, and was it likely they would grant it, to subdue his rebellious American provinces?

Sir, it was in this posture of affairs, on an occasion which has already been alluded to, that I ventured to say, early in the session of December, 1823, that these allied monarchs might possibly turn their attention to America; that America came within their avowed doctrine, and that her examples might very possibly attract their notice. The doctrines of Laybach were not limited to any continent; Spain had colonies in America, and having reformed Spain herself to the true standard, it was not impossible that they might see fit to complete the work by reconciling in their way, the colonies to the mother country. Now, sir, it did so happen, that as soon as the Spanish king was completely re-established, he did invite the co-operation of his allies, in regard to South America. In the same month of December, of 1823, a formal invitation was addressed by Spain to the courts of St. Petersburg, Vienna, Berlin and Paris, proposing to establish a conference at Paris, in order that the plenipotentiaries, there assembled, might aid Spain in adjusting the affairs of her revolted provinces. These affairs were proposed to be adjusted in such manner as should retain the sovereignty of Spain over them; and though the co-operation of the allies, by force of arms, was not directly solicited—such was evidently the object aimed at.

The king of Spain, in making this request to the members of the holy alliance, argued, as it had been



seen he might argue. He quoted their own doctrines of Laybach; he pointed out the pernicious example of America; and he reminded them that their success, in Spain itself, had paved the way for successful operations against the spirit of liberty on this side the Atlantic.

The proposed meeting, however, did not take place. England had already taken a decided course; for, as early as October, Mr. Canning, in a conference with the French minister in London, informed him distinctly and expressly, that England would consider any foreign interference, by force or by menace, in the dispute between Spain and the colonies, as a motive for recognizing the latter, without delay.

It is probable this determination of the English government was known here, at the commencement of the session of Congress; and it was under these circumstances, it was in this crisis, that Mr. Monroe's declaration was made. It was not then ascertained whether a meeting of the allies would, or would not, take place, to concert with Spain the means of re-establishing her power; but it was plain enough they would be pressed by Spain to aid her operations; and it was plain enough also, that they had no particular liking to what was taking place on this side the Atlantic, nor any great disinclination to interfere. This was the posture of affairs; and, sir, I concur entirely in the sentiment expressed in the resolution of a gentleman from Pennsylvania, (Mr. Markley,) that this declaration of Mr. Monroe was wise, seasonable and patriotic.

It has been said, in the course of this debate, to have been a loose and vague declaration. It was, I believe, sufficiently studied. I have understood, from good authority, that it was considered, weighed, and distinctly and decidedly approved by every one of the President's advisers at that time. Our government could not adopt, on that occasion, precisely the course which England had taken. England threatened the immediate recognition of the provinces, if the allies should

take part with Spain against them. We had already recognized them. It remained, therefore, only for our government to say how we should consider a combination of the allied powers, to effect objects in America, as affecting ourselves; and the message was intended to say, what it does say, that we should regard such combination as dangerous to us. Sir, I agree with those who maintain the proposition, and I contend against those who deny it, that the message did mean something; that it meant much; and I maintain, against both, that the declaration effected much good, answered the end designed by it, did great honor to the foresight, and the spirit of the government, and that it cannot now be taken back, retracted or annulled, without disgrace. It met, sir, with the entire concurrence, and the hearty approbation of the country. The tone which it uttered found a corresponding response in the breasts of the free people of the United States. That people saw, and they rejoiced to see, that, on a fit occasion, our weight had been thrown into the right scale, and that, without departing from our duty, we had done something useful, and something effectual, for the cause of civil liberty. One general glow of exultation—one universal feeling of the gratified love of liberty—one conscious and proud perception of the consideration which the country possessed, and of the respect and honor which belonged to it—pervaded all bosoms. Possibly the public enthusiasm went too far; it certainly did go far. But, sir, the sentiment which this declaration inspired was not confined to ourselves. Its force was felt everywhere, by all those who could understand its object, and foresee its effect. In that very house of commons, of which the gentleman from South Carolina has spoken with such commendation, how was it there received? Not only, sir, with approbation, but, I may say, with no little enthusiasm. While the leading minister expressed his entire concurrence in the sentiments and opinions of the American President, his distinguished competitor in that popular body, less restrained by official decorum, more at liber-



ty to give utterance to the feeling of the occasion, declared that no event had ever created greater joy, exultation and gratitude, among all the free men in Europe; that he felt pride in being connected by blood and language, with the people of the United States; that the policy disclosed by the message, became a great, a free, and an independent nation; and that he hoped his own country would be prevented by no mean pride, or paltry jealousy, from following so noble and glorious an example.

It is doubtless true, as I took occasion to observe the other day, that this declaration must be considered as founded on our rights, and to spring mainly from a regard to their preservation. It did not commit us at all events to take up arms, on any indication of hostile feeling by the powers of Europe towards South America. If, for example, all the states of Europe had refused to trade with South America, until her states should return to their former allegiance, that would have furnished no cause of interference to us. Or if an armament had been furnished by the allies to act against provinces the most remote from us, as Chili or Buenos Ayres, the distance of the scene of action diminishing our apprehension of danger, and diminishing also our means of effectual interposition, might still have left us to content ourselves with remonstrance. But a very different case would have arisen, if an army, equipped and maintained by these powers, had been landed on the shores of the Gulph of Mexico, and commenced the war in our own immediate neighborhood. Such an event might justly be regarded as dangerous to ourselves, and, on that ground, to have called for decided and immediate interference by us. The sentiments and the policy announced by the declaration, thus understood, were, therefore, in strict conformity to our duties and our interest.

Sir, I look on the message of December, 1823, as forming a bright page in our history. I will neither help to erase it, or tear it out; nor shall it be, by any

act of mine, blurred or blotted. It did honor to the sagacity of the government, and I will not diminish that honor. It elevated the hopes, and gratified the patriotism of the people. Over those hopes I will not bring a mildew; nor will I put that gratified patriotism to shame.

But how should it happen, sir, that there should now be such a new-born fear, on the subject of this declaration? The crisis is over; the danger is past. At the time it was made, there was real ground for apprehension: now there is none. It was then possible, perhaps not improbable, that the allied powers might interfere with America. There is now no ground for any such fear. Most of the gentlemen, who have now spoken on the subject, were at that time here. They all heard the declaration. Not one of them complained. And yet, now, when all danger is over, we are vehemently warned against the sentiments of the declaration.

To avoid this apparent inconsistency, it is, however, contended, that new force has been recently given to this declaration. But of this, I see no evidence whatever. I see nothing in any instructions or communications from our government changing the character of that declaration in any degree. There is, as I have before said, in one of Mr. Poinsett's letters, an inaccuracy of expression. If he has recited correctly his conversation with the Mexican minister, he did go too far: farther than any instructions warranted. But, taking his whole correspondence together, it is quite manifest that he has deceived nobody, nor has he committed the country. On the subject of a pledge, he put the Mexican minister entirely right. He stated to him, distinctly, that this government had given no pledge which others could call upon it to redeem. What could be more explicit? Again, sir: it is plain that Mexico thought us under no greater pledge than England: for the letters to the English and American ministers, requesting interference, were in precisely the same words. When this passage in Mr. Poinsett's

letter was first noticed, we were assured there was and must be some other authority for it. It was confidently said he had instructions, authorizing it, in his pocket. It turns out otherwise. As little ground is there to complain of any thing in the secretary's letter to Mr. Poinsett. It seems to me to be precisely what it should be. It does not, as has been alleged, propose any co-operation between the government of Mexico and our own. Nothing like it. It instructs our ministers to bring to the notice of the Mexican government the line of policy which we have marked out for ourselves—acting on our own grounds, and for our own interests; and to suggest to that government, acting on its own ground, and for its own interests, the propriety of following a similar course. Here, sir, is no alliance, nor even any co-operation.

So, again, as to the correspondence which refers to the appearance of the French fleet in the West India seas. Be it remembered, that our government was contending, in the course of this correspondence with Mexico, for an equality in matters of commerce. It insisted on being placed, in this respect, on the same footing as the other South American states. To enforce this claim, our known friendly sentiments towards Mexico, as well as to the rest of the new states, were suggested—and properly suggested. Mexico was reminded of the timely declaration which had been made of these sentiments. She was reminded that she herself had been well inclined to claim the benefit resulting from that declaration, when a French fleet appeared in the neighboring seas; and she was referred to the course adopted by our government on that occasion, with an intimation, that she might learn from it how the same government would have acted if other possible contingencies had happened. What is there, in all this, of any renewed pledge, or what is there of any thing beyond the true line of our policy? Do gentlemen mean to say, that the communication made to France, on this occasion, was improper? Do they mean to repel and repudiate that declaration?



That declaration was, that we could not see Cuba transferred from Spain to another European power. If the House mean to contradict that—be it so. If it do not, then, as the government had acted properly in this case, it did furnish ground to believe it would act properly, also, in other cases, when they arose. And the reference to this incident or occurrence by the secretary, was pertinent to the argument which he was pressing on the Mexican government.

I have but a word to say on the subject of the declaration against European colonization in America. The late President seems to have thought the occasion used by him for that purpose to be a proper one for the open avowal of a principle which had already been acted upon. Great and practical inconveniences, it was feared, might be apprehended, from the establishment of new colonies in America, having a European origin and a European connexion. Attempts of that kind, it was obvious, might possibly be made, amidst the changes that were taking place, in Mexico, as well as in the more southern states. Mexico bounds us, on a vast length of line, from the Gulf of Mexico to the Pacific Ocean. There are many reasons why it should not be desired by us, that an establishment, under the protection of a different power, should occupy any portion of that space. We have a general interest, that through all the vast territories rescued from the dominion of Spain, our commerce might find its way, protected by treaties with governments existing on the spot. These views, and others of a similar character, rendered it highly desirable to us, that these new states should settle it, as a part of their policy, not to allow colonization within their respective territories. True, indeed, we did not need their aid to assist us in maintaining such a course for ourselves; but we had an interest in their assertion and support of the principle as applicable to their own territories.

I now proceed, Mr. Chairman, to a few remarks on the subject of Cuba, the most important point of our

foreign relations. It is the hinge on which interesting events may possibly turn. I pray gentlemen to review their opinions on this subject before they fully commit themselves. I understood the honorable member from South Carolina to say, that if Spain chose to transfer this island to any power in Europe, she had a right to do so, and we could not interfere to prevent it. Sir, this is a delicate subject. I hardly feel competent to treat it as it deserves; and I am not quite willing to state here all that I think about it. I must, however, dissent from the opinion of the gentleman from South Carolina. The right of nations, on subjects of this kind, are necessarily very much modified by circumstances. Because England or France could not rightfully complain of the transfer of Florida to us, it by no means follows, as the gentleman supposes, that we could not complain of the cession of Cuba to one of them. The plain difference is, that the transfer of Florida to us was not dangerous to the safety of either of those nations, nor fatal to any of their great and essential interests. Proximity of position, neighborhood, whatever augments the power of injuring and annoying, very properly belong to the consideration of all cases of this kind. The greater or less facility of access itself is of consideration in such questions, because it brings, or may bring, weighty consequences with it. It justifies, for these reasons, and on these grounds, what otherwise might never be thought of. By negotiation with a foreign power, Mr. Jefferson obtained a province. Without any alteration of our constitution, we have made it part of the United States, and its senators and representatives, now coming from several states, are here among us. Now, sir, if, instead of being Louisiana, this had been one of the provinces of Spain proper, or one of her South American colonies, he must have been a madman, that should have proposed such an acquisition. A high conviction of its convenience, arising from proximity, and from close natural connexion, alone reconciled the country to the



measure. Considerations of the same sort have weight in other cases.

An honorable member from Kentucky, (Mr. Wickliffe,) argues, that although we might rightfully prevent another power from taking Cuba from Spain, by force, yet if Spain should choose to make the voluntary transfer, we should have no right whatever to interfere. Sir, this is a distinction without a difference. If we are likely to have contention about Cuba, let us first well consider what our rights are, and not commit ourselves. And, sir, if we have any right to interfere at all, it applies as well to the case of a peaceable, as to that of a forcible transfer. If nations be at war, we are not judges of the question of right, in that war; we must acknowledge, in both parties, the mutual right of attack, and the mutual right of conquest. It is not for us to set bounds to their belligerent operations, so long as they do not affect ourselves. Our right to interfere, sir, in any such case, is but the exercise of the right of reasonable and necessary self-defence. It is a high and delicate exercise of that right; one not to be made but on grounds of strong and manifest reason, justice and necessity. The real question is, whether the possession of Cuba by a great maritime power of Europe, would seriously endanger our own immediate security, or our essential interests. I put the question, sir, in the language of some of the best considered state papers of modern times. The general rule of national law, is, unquestionably, against interference, in the transactions of other states. There are, however, acknowledged exceptions, growing out of circumstances, and founded in those circumstances. These exceptions, it has been properly said, cannot, without danger, be reduced to previous rule, and incorporated into the ordinary diplomacy of nations. Nevertheless, they do exist, and must be judged of, when they arise, with a just regard to our own essential interests, but in a spirit of strict justice and delicacy also towards foreign states.



The ground of these exceptions is, as I have already stated, self-preservation. It is not a slight injury to our interest; it is not even a great inconvenience, that makes out a case. There must be danger to our security, or danger, manifest and imminent danger, to our essential rights, and our essential interests. Now, sir, let us look at Cuba. I need hardly refer to its present amount of commercial connexion with the United States. Our statistical tables, I presume, would show us, that our commerce with the Havanna alone, is more in amount than our whole commercial intercourse with France and all her dependencies. But this is but one part of the case, and not the most important. Cuba, as is well said in the report of the committee of foreign affairs, is placed in the mouth of the Mississippi. Its occupation by a strong maritime power would be felt, in the first moment of hostility, as far up the Mississippi and the Missouri, as our population extends. It is the commanding point of the gulph of Mexico. See, too, how it lies in the very line of our coast-wise traffic; interposed in the very highway between New York and New Orleans.

Now, sir, who has estimated, or who can estimate, the effect of a change, which should place this island in other hands, subject it to new rules of commercial intercourse, or connect it with objects of a different and still more dangerous nature? Sir, I repeat that I feel no disposition to pursue this topic, on the present occasion. My purpose is only to show its importance, and to beg gentlemen not to prejudice any rights of the country by assenting to propositions, which, perhaps, may be necessary to be reviewed.

And here I differ again with the gentleman from Kentucky. He thinks that, in this, as in other cases, we should wait till the event comes, without any previous declaration of our sentiments upon subjects important to our own rights or our own interests. Sir, such declarations are often the appropriate means of preventing that which, if unprevented, it might be dif-

ficult to redress. A great object in holding diplomatic intercourse, is frankly to expose the views and objects of nations, and to prevent, by candid explanation, collision and war. In this case, the government has said that we could not assent to the transfer of Cuba to another European state. Can we so assent? Do gentlemen think we can? If not, then it was entirely proper that this intimation should be frankly and seasonably made. Candor required it; and it would have been unpardonable, it would have been injustice, as well as folly, to have been silent, while we might suppose the transaction to be contemplated, and then to complain of it afterwards. If we should have a subsequent right to complain, we have a previous right, equally clear, of protesting; and if the evil be one, which, when it comes, would allow us to apply a remedy, it not only allows us, but it makes it our duty, also, to apply prevention.

But, sir, while some gentlemen have maintained, that on the subject of a transfer to any of the European powers, the President has said too much, others insist that on that of the islands being occupied by Mexico or Colombia, he has said and done too little. I presume, sir, for my own part, that the strongest language has been directed to the source of greatest danger. Heretofore that danger was, doubtless, greatest, which was apprehended from a voluntary transfer. The other has been met, as it arose; and, thus far, adequately and sufficiently met. And here, sir, I cannot but say that I never knew a more extraordinary argument than we have heard on the conduct of the executive on this part of the case. The President is charged with inconsistency; and, in order to make this out, public despatches are read, which, it is said, militate with one another.

Sir, what are the facts? This government saw fit to invite the emperor of Russia to use his endeavors to bring Spain to treat of peace with her revolted colonies. Russia was addressed on this occasion as

the friend of Spain ; and, of course, every argument which it was thought might have influence, or ought to have influence, either on Russia or Spain, was suggested in the correspondence. Among other things, the probable loss to Spain, of Cuba and Puerto Rico, was urged ; and the question was asked, how it was, or could be, expected by Spain, that the United States could interfere, to prevent Mexico and Colombia from taking those islands from her, since she was their enemy, in a public war, and since she pertinaciously, and unreasonably, as we think, insists on maintaining the war ; and since these islands offered an obvious object of attack ? Was not this, sir, a very proper argument to be urged to Spain ? A copy of this despatch, it seems, was sent to the senate, in confidence. It has not been published by the executive. Now, the alleged inconsistency is, that, notwithstanding this letter, the President has interfered to dissuade Mexico and Colombia from attacking Cuba ; that, finding or thinking that those states meditated such a purpose, this government has urged them to desist from it. Sir, was ever any thing more unreasonable than this charge ? Was it not proper, that, to produce the desired result of peace, our government should address different motives to the different parties in the war ? Was it not its business to set before each party its dangers and its difficulties, in pursuing the war ? And if, now, by any thing unexpected, these respective correspondences have become public, are these different views, addressed thus to different parties, and with different objects, to be relied on as proof of inconsistency ? It is the strangest accusation ever heard of. No government, not wholly destitute of common sense, would have acted otherwise. We urged the proper motives to both parties. To Spain we urged the probable loss of Cuba ; we showed her the dangers of its capture by the new states ; and we asked her to inform us on what ground it was, that we could interfere to prevent such capture, since she was at war with these states, and they had an unquestionable



right to attack her in any of her territories; and especially she was asked, how she could expect good offices from us, on this occasion, since she fully understood our opinion to be, that she was persisting in the war without, or beyond, all reason, and with a sort of desperation. This was the appeal made to the good sense of Spain, through Russia. But, soon afterwards, having reason to suspect that Colombia and Mexico were actually preparing to attack Cuba, and knowing that such an event would most seriously affect us, our government remonstrated against such meditated attack, and to the present time it has not been made. In all this, who sees any thing either improper or inconsistent? For myself, I think the course pursued showed a watchful regard to our own interest, and is wholly free from any imputation, either of impropriety, or inconsistency.

There are other subjects, sir, in the President's message, which have been discussed in the debate, but on which I shall not detain the committee.

It cannot be denied, that from the commencement of our government, it has been its object to improve and simplify the principles of national intercourse. It may well be thought a fit occasion to urge these improved principles, at a moment when so many new states are coming into existence, untrammelled, of course, with previous and long established connexions or habits. Some hopes of benefit, connected with these topics, are suggested in the message.

The abolition of private war on the ocean, is also among the subjects of possible consideration. This is not the first time that that subject has been mentioned. The late President took occasion to enforce the considerations which he thought recommended it. For one, I am not prepared to say how far such abolition may be practicable, or how far it ought to be pursued; but there are views belonging to the subject, which have not been, in any degree, answered or considered, in this discussion.

Sir, it is not always the party that has the power of

employing the largest military marine, that enjoys the advantage by authorizing privateers in war. It is not enough that there are brave and gallant captors; there must be something to be captured. Suppose, sir, a war between ourselves and any one of the new states of South America were now existing, who would lose most, by the practice of privateering, in such a war? There would be nothing for us to attack; while the means of attacking us would flow to our enemies from every part of the world. Capital, ships and men, would be abundant in all their ports, and our commerce, spread over every sea, would be the destined prey. So, again, if war should unhappily spring up among those states themselves, might it not be for our interest, as being likely to be much connected by intercourse with all parties, that our commerce should be free from the visitation and search of private armed ships; one of the greatest vexations to neutral commerce in time of war? These, sir, are some of the considerations belonging to this subject. I have mentioned them only to show that they well deserve serious attention.

I have not intended to reply to the many observations which have been submitted to us, on the message of the President to this House, or that to the senate. Certainly I am of opinion, that some of those observations merited an answer, and they have been answered by others. On two points only will I make a remark. It has been said, and often repeated, that the President in his message to the senate, has spoken of his own power in regard to missions, in terms which the constitution does not warrant. If gentlemen will turn to the message of President Washington, relative to the mission to Lisbon, in the tenth volume of State Papers, they will see almost the exact form of expression used in this case. The other point, on which I would make a remark, is the allegation, that an unfair use has been made in the argument of the message, of general Washington's Farewell Address. There would be no end, sir, to comments and criti-

cisms, of this sort, if they were to be pursued. I only observe, that, as it appears to me, the argument of the message, and its use of the Farewell Address, are not fairly understood. It is not attempted to be inferred from the Farewell Address, that, according to the opinion of Washington, we ought now to have alliances with foreign states. No such thing. The Farewell Address recommends to us, to abstain as much as possible from all sorts of political connexion with the states of Europe, alleging, as the reason for this advice, that Europe has a set of primary interests of her own, separate from ours, and with which we have no natural connexion. Now the message argues, and argues truly, that the new South American States, not having a set of interests of their own growing out of the balance of power, family alliances, &c., separate from ours, in the same manner, and to the same degree, as the primary interests of Europe were represented to be; this part of the Farewell Address, aimed at those separate interests expressly, did not apply in this case. But does the message infer from this the propriety of alliances with these new states? Far from it. It infers no such thing. On the contrary, it disclaims all such purpose.

There is one other point, sir, on which common justice requires a word to be said. It has been alleged that there are material differences, as to the papers sent respectively to the two Houses. All this, as it seems to me, may be easily and satisfactorily explained. In the first place, the instructions of May, 1823, which, it is said, were not sent to the senate, were instructions on which a treaty had been already negotiated; which treaty had been subsequently ratified by the senate. It may be presumed, that when the treaty was sent to the senate, the instructions accompanied it; and if so, they were actually already before the senate; and this accounts for one of the alleged differences. In the next place, the letter to Mr. Middleton, in Russia, not sent to the House, but now published by the senate, is such a paper as possibly the President



might not think proper to make public. There is evident reason for such an inference. And, lastly, the correspondence of Mr. Brown, sent here, but not to the senate, appears, from its date, to have been received after the communication to the senate. Probably when sent to us, it was also sent, by another message, to that body.

These observations, sir, are tedious and uninteresting. I am glad to be through with them. And here I might terminate my remarks, and relieve the patience, now long and heavily taxed, of the committee. But there is one part of the discussion, on which I must ask to be indulged with a few observations.

Pains, sir, have been taken by the honorable member from Virginia, to prove that the measure now in contemplation, and, indeed, the whole policy of the government respecting South America, is the unhappy result of the influence of a gentleman formerly filling the chair of this House. To make out this, he has referred to certain speeches of that gentleman delivered here. He charges him with having become himself affected at an early day with what he is pleased to call the South American fever; and with having infused its baneful influence into the whole councils of the country.

If, sir, it be true, that that gentleman, prompted by an ardent love of civil liberty, felt, earlier than others, a proper sympathy for the struggling colonies of South America; or that, acting on the maxim, that revolutions do not go backward, he had the sagacity to foresee, earlier than others, the successful termination of those struggles; if, thus feeling, and thus perceiving, it fell to him to lead the willing or unwilling councils of his country, in her manifestations of kindness to the new governments, and in her seasonable recognition of their independence; if it be this which the honorable member imputes to him; if it be by this course of public conduct that he has identified his name with the cause of South American liberty, he ought to be esteemed one of the most fortunate men of the age.

If all this be, as is now represented, he has acquired fame enough. It is enough for any man, thus to have connected himself with the greatest events of the age in which he lives, and to have been foremost in measures which reflect high honor on his country, in the judgment of mankind. Sir, it is always with great reluctance that I am drawn to speak, in my place here, of individuals; but I could not forbear what I have now said, when I hear, in the House of Representatives, and in this land of free spirits, that it is made matter of imputation and of reproach, to have been first to reach forth the hand of welcome and of succor to new-born nations, struggling to obtain, and to enjoy, the blessings of liberty.

We are told that the country is deluded and deceived by caballistic words. Caballistic words! If we express an emotion of pleasure at the results of this great action of the spirit of political liberty; if we rejoice at the birth of new republican nations, and express our joy by the common terms of regard and sympathy; if we feel and signify high gratification that, throughout this whole continent, men are now likely to be blessed by free and popular institutions; and if, in the uttering of these sentiments, we happen to speak of sister republics; of the great American family of nations; or of the political system and forms of government of this hemisphere, then indeed, it seems, we deal in senseless jargon, or impose on the judgment and feeling of the community by caballistic words! Sir, what is meant by this? Is it intended that the people of the United States ought to be totally indifferent to the fortunes of these new neighbors? Is no change, in the lights in which we are to view them, to be wrought, by their having thrown off foreign dominion, established independence, and instituted, on our very borders, republican governments, essentially after our own example?

Sir, I do not wish to overrate, I do not overrate, the progress of these new states in the great work of establishing a well-secured popular liberty. I know that

to be a great attainment, and I know they are but pupils in the school. But, thank God, they are in the school. They are called to meet difficulties, such as neither we nor our fathers encountered. For these, we ought to make large allowances. What have we ever known like the colonial vassallage of these states? When did we or our ancestors, feel, like them, the weight of a political despotism that presses men to the earth, or of that religious intolerance which would shut up heaven to all but the bigoted? Sir, we sprung from another stock. We belong to another race. We have known nothing—we have felt nothing of the political despotism of Spain, nor of the heat of her fires of intolerance. No rational man expects that the south can run the same rapid career as the north; or that an insurgent province of Spain is in the same condition as the English colonies, when they first asserted their independence. There is, doubtless, much more to be done, in the first than in the last case. But on that account the honor of the attempt is not less; and if all difficulties shall be in time surmounted, it will be greater. The work may be more arduous—it is not less noble, because there may be more of ignorance to enlighten; more of bigotry to subdue; more of prejudice to eradicate. If it be a weakness to feel a strong interest in the success of these great revolutions, I confess myself guilty of that weakness. If it be weak to feel that I am an American, to think that recent events have not only opened new modes of intercourse, but have created also new grounds of regard and sympathy between ourselves and our neighbors; if it be weak to feel that the south, in her present state, is somewhat more emphatically a part of America, than when she lay obscure, oppressed and unknown, under the grinding bondage of a foreign power; if it be weak to rejoice, when, even in any corner of the earth, human beings are able to get up from beneath oppression, to erect themselves, and to enjoy the proper happiness of their intelligent nature; if this be weak, it is a weakness from which I claim no exemption.



A day of solemn retribution now visits the once proud monarchy of Spain. The prediction is fulfilled. The spirit of Montezuma and of the Incas might now well say,

“ Art thou, too, fallen, Iberia? Do we see  
The robber and the murderer weak as we?  
Thou! that has wasted earth and dared despise  
Alike the wrath and mercy of the skies,  
Thy pomp is in the grave; thy glory laid  
Low in the pit thine avarice has made.”

Mr. Chairman, I will detain you only with one more reflection on this subject. We cannot be so blind—we cannot so shut up our senses, and smother our faculties, as not to see, that in the progress and the establishment of South American liberty, our own example has been among the most stimulating causes. That great light—a light which can never be hid—the light of our own glorious revolution, has shone on the path of the South American patriots, from the beginning of their course. In their emergencies, they have looked to our experience; in their political institutions, they have followed our models; in their deliberations, they have invoked the presiding spirit of our own liberty. They have looked steadily, in every adversity, to the great northern light. In the hour of bloody conflict, they have remembered the fields which have been consecrated by the blood of our own fathers; and when they have fallen, they have wished only to be remembered, with them, as men who had acted their parts bravely, for the cause of liberty in the western world.

Sir, I have done. If it be weakness to feel the sympathy of one's nature excited for such men, in such a cause, I am guilty of that weakness. If it be prudence to meet their proffered civility, not with reciprocal kindness, but with coldness or with insult, I choose still to follow where natural impulse leads, and to give up that false and mistaken prudence, for the voluntary sentiments of my heart.

## SPEECH OF GEORGE M'DUFFIE,

DELIVERED

IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, FEBRUARY 15 AND 16, 1826,

On the following resolutions, "*Resolved*, That, for the purpose of electing the President and Vice President of the United States, the constitution ought to be so amended, that a uniform system of voting by districts, shall be established in all the states ; and that the constitution ought to be further amended, in such manner as will prevent the election of the aforesaid officers from devolving upon the respective Houses of Congress.

"*Resolved*, That a select committee be appointed, with instructions to prepare and report a joint resolution, embracing the aforesaid objects."



MR. CHAIRMAN,

THE resolution, which has been referred to the consideration of the committee, is resolvable into two distinct practical propositions, as plain and obvious in their import as they are unquestionably important in their tendency. The first contemplates the establishment of a uniform mode of voting, by districts, for the President and Vice President of the United States, instead of leaving it to the legislatures of the respective states, either to prescribe and vary the mode of voting, or to assume and exercise that important function themselves. The second proposes that, in the event of no person receiving a majority of all the electoral votes, at the first balloting, some provision shall be made for the final disposition of the contest, that will supersede the eventual interference of either branch of Congress in the election of the two chief executive magistrates of the republic. As the resolution does not declare whether it is expedient that the electors should be dispensed with or retained, nor indicate the substitute by which the final election shall

be prevented from devolving upon Congress, I will very briefly state the details of the proposed amendment, in reference to these particular objects.

As the electors, if retained at all, would hold their first balloting immediately after they are chosen and under circumstances that would almost preclude the possibility of tampering or corruption, I am willing to acquiesce in any decision that a majority of the committee may make upon the question of retaining them in the first instance. For, although I do not believe the electors to be of any possible utility in the system, and can perceive considerable objections to retaining them even thus partially, yet, if a majority of the committee should think differently, I will cheerfully sacrifice this minor consideration, to ensure the accomplishment of the great object of the contemplated amendment.

But, in case the primary vote of the electoral colleges shall fail to decide the election, I propose that the two highest candidates, respectively, shall be referred back to the people, voting directly for the President and Vice President by districts. For, when it is considered that at least three or four months must unavoidably elapse between the first and the second balloting, the argument against retaining a body of electors for so long a period exposed to temptation, becomes, in my judgment, irresistible. And, in addition to this view of the subject, when the contest is reduced to a simple issue between two competitors, there is an end of all the conceivable reasons for a discretionary agency, and the interposition of electors can only be regarded as at best a useless incumbrance.

Such, Mr. Chairman, is the brief outline of an amendment, which so emphatically speaks its own importance, that I need scarcely invoke the patient and undivided attention of those, who, under the most solemn responsibility to the present and future generations, are to pronounce and record their judgments upon it.

In bringing forward this plan of constitutional reform, I am not unaware of the obstacles, common to



every similar undertaking, that must be unavoidably encountered. Some there are, who, in their indiscriminating reverence for the excellencies and imperfections of the constitution, are disposed to regard every proposition to amend it, as a dangerous innovation. Although it is undoubtedly true, that every change is not an improvement, and that the constitution ought never to be altered, even under the clearest convictions of theoretical propriety, for 'slight or transient' causes, yet it is equally true, that to stand indiscriminately opposed to all changes, is, to say the least of it, the dictate of a very superficial wisdom. It is offering an idolatrous homage at the shrine of the constitution, which the constitution itself explicitly disclaims. That the clause which provides for its own amendment, stands amongst the least equivocal indications of the wisdom of its framers, will be apparent to every one who will reflect but for a single moment, upon the vast comprehensiveness of their labors, and the peculiar circumstances under which they were performed.

Called together by an extraordinary and alarming emergency, and acting under the influence of the excited passions, unavoidably incident to a crisis portending anarchy and civil strife, the convention were under the necessity of forming, in a few months, the entire structure of a government, perfectly new in its principles, and destined, in less than a single century from the period of its formation, to extend either its blessings or its curses, to a larger number of civilized human beings than were ever before associated under the auspices of one common government! When, to this view of the impressive magnitude and growing character of the objects and interests committed to the charge of the federal convention, we add the consideration that they consisted of delegates from thirteen independent sovereignties, having rival interests, and conflicting views to harmonize, the wonder is, not that they failed to make a perfect constitution, but that they made any constitution at all. And here, sir, I will take occasion to remark, as having a more immediate bearing upon

the proposition before us, that, in the organization of the executive department of the government, that department in which it has always been found most difficult to unite the elements, the essential elements of liberty and power; the convention, deriving but few, and glimmering, and delusive lights from history, have most signally failed in accomplishing their patriotic intentions, though this is undoubtedly the part of the system which they regarded as least obnoxious to objection—an impressive admonition to us all, how seldom, in the conduct of human affairs, the wisdom of man transcends the narrow horizon of his experience! In connexion with this view of the subject, I will venture to express the opinion with confidence, that the common mass of tolerably informed politicians, in the present day, having witnessed the actual operation of this part of our political system, understand it decidedly better than the wisest member of the convention. In uttering this opinion, I derogate nothing from the wisdom of that venerable assembly. They were too wise not to form a just estimate, themselves, of their own situation. Conscious of the complicated and perplexing difficulties under which they acted, and viewing their own work, not with the vain arrogance of the Spartan lawgiver, but with the profound wisdom of experimental philosophers, so far from attempting to render it immutable, by proscribing all changes under the imposing sanctions of religion, they adopted a much more effectual means of rendering it immortal, by providing a regulated mode of remedying its imperfections. It is thus that the fundamental laws of the republic, without the violence and blood that have marked the revolutionary throes of other countries, can be gradually and peaceably accommodated to the successive changes and progressive improvements of the social system. In offering to lay the hand of reformation upon the venerated fabric of the constitution, I feel sustained by the consciousness that I am doing nothing more than the members of the convention would themselves do, had it pleased



Providence that they should have lived to participate in the deliberations of this day. I shall proceed, therefore, without either superstitious awe, on the one hand, or unbecoming irreverence, on the other, to expose the existing defects of the constitution, and to indicate what I believe to be the appropriate remedy. And I here distinctly admit, that, before I can expect any member of the committee to vote for a proposition involving a fundamental change in the constitution, I am, upon every principle of sound reasoning, bound to establish the affirmative of the proposition. It is our propitious fortune to exist under a government that has, in the main, answered all the great ends for which governments are instituted. Enjoying, in fact, a system of regulated liberty, more perfect in its past operations than any which has heretofore existed in the world, it is the part of wisdom to abstain from change, until the actual existence or threatened approach of danger is clearly and satisfactorily demonstrated.

The first branch of the resolution, we are considering, declares the expediency of establishing a uniform system of voting, by districts, for the President and Vice President. By adverting, for a moment, to the existing provisions of the constitution, on this subject, it will be perceived that the important operation of electing the two chief executive officers of the United States is not regulated by any constitutional rule whatever. The constitution, by declaring that "each state shall appoint the electors, in such manner as the legislature thereof may prescribe," puts an unequivocal negative upon the idea of fixedness and permanence, which essentially enter into the elementary notion of constitutional regulation. Different rules prevail in the same state at different times, and in the different states at the same time, all liable to be changed according to the varying views and fluctuating fortunes of political parties. It may be assumed as a political axiom, that those creative acts of popular sovereignty, which bring the machine of government into existence, and put it in motion, ought to



be placed beyond the power of any legislative control whatever. The reason is obvious. This superior stability of the fundamental law is essential to protect the rights of the minority from the injustice and oppression of the majority. All experience proves that it is in the very nature of political parties to "feel power and forget right." The end which every party proposes to itself, as the object of its united effort, is power. In the pursuit of this object, the majority lose that sense of justice which should protect the rights of the weaker party. They easily persuade themselves that the good of the country will be promoted by excluding their opponents from power, and, under the delusive belief that they are sustained by patriotic motives, they commit the most flagrant acts of outrage upon the minority. What, sir, has been our own experience on the subject? Some ten or fifteen years ago, the dominant party in the state of Massachusetts made an artificial arrangement of the districts, so as to exclude the minority from power almost as completely as the change from the district to the general ticket system would have done it. After the individual, I believe, who was principally instrumental in bringing about this scheme of party tyranny, it is known over the whole union by the name of the Gerrymandering system. The people were roused to indignation, not only in Massachusetts, but throughout the United States. Under a lively sense of the injustice and oppression of this proceeding, and of perhaps some analogous occurrences in other states, the proposition for establishing a uniform district system of voting for the electors of President was brought forward by North Carolina—a state which, to her other claims to consideration in the union, adds a steadfast and uniform adherence to sound republican principles. This proposition was concurred in by a large majority of the legislatures of the states, and, amongst the rest, two of the largest states in the union, New York and Virginia, adopted it by an almost unanimous vote of their respective legislatures.

But an argument in favor of the proposed amendment, results from the obvious propriety of establishing not only a permanent, but a uniform system of voting for the President, in all the states. It is not merely for the sake of constitutional symmetry, that this uniformity is desirable, but it is indispensable to the existence of that political justice, which is the bond and cement of our union. To illustrate the nature and extent of the evil, growing out of a want of uniformity in the modes of voting in different states, I will state a case which, so far from being extreme, will probably occur at the very next presidential election, if this amendment be not adopted. New York has established the district system; Virginia still adheres to the general ticket system. Let us suppose the people of New York, entitled to thirty-six electoral votes for President, to be divided in opinion between two rival candidates, in the proportion of nineteen to seventeen: the result would be, that she would give nineteen votes to one candidate and seventeen to his opponent, leaving a majority of two votes only in favor of the candidate who stood highest in her confidence. Let us now suppose the people of Virginia, entitled to twenty-four votes, to be divided in opinion between the two rival candidates, in the proportion of thirteen to eleven. Voting by the general ticket, she would give the whole of the electoral votes of the state to her favorite candidate. It is thus apparent that New York, voting by districts, would exert only one twelfth part of the power in the election of the President, that Virginia, voting by the general ticket, would exercise, when, in point of fact, the people of Virginia were as much divided in opinion, between the competing candidates, as the people of New York. The gross and palpable injustice of permitting such a state of things to continue must be apparent to every one. It is not in the nature of things, that any state can long submit to such political inequality. However striking the superiority of the district system may be considered by the people, whatever may be its in-



trinsic excellence, all the states must abandon it, and establish the general ticket system, in self-defence, unless we establish a uniform district system for the whole union.

Against these weighty considerations in favor of a uniform system, what rational arguments can be raised, even by the most refined ingenuity? Can it be maintained that there exist local peculiarities in the different states, that render it expedient that different modes of voting should prevail? Is there any thing in the local situation of New York which renders the district system proper in that state, while in Virginia the general ticket is best adapted to existing circumstances? This will not be pretended. It cannot be conceived that any reason can be applied to one state, that would not be equally applicable to all others, in regard to the mode of voting. It is a very different thing to determine the extent of the right of suffrage in the different states. This does depend upon local peculiarities, and is, therefore, appropriately a question for the states to decide for themselves. But even in relation to this matter, the fundamental law does not depend upon the will of the state legislatures. The persons qualified to vote for the most numerous branch of the state legislature will vote for the electors of President; but those persons are ascertained and fixed, in all the states, by their respective constitutions. It must be admitted, I think, however gentlemen may differ in opinion as to which of the different modes of voting is preferable, that some one of them is better than the rest. This being conceded, it follows, as an unavoidable consequence, that the system which is best ought to be adopted in all the states. Assuming, then, that I have shown that, whatever mode we adopt, it ought to be permanent and uniform, it only remains to inquire, which of the modes that have prevailed in the different states, ought to be adopted. These are, the legislative mode, the general ticket system, and the district system.

Proceeding to examine these several plans, in the



order in which I have stated them, I shall very briefly dispose of the first. As to the power which the legislatures of most of the states have assumed, at one time or another, of choosing the presidential electors themselves, I feel assured that I shall have the concurrence of a large majority of those who hear me, when I pronounce it a usurpation. Yes, sir, the very first acts of the state legislatures, in relation to the election of the President, furnish the best refutation of the doctrine held by some gentlemen, that the state legislatures ought to retain an agency and control, in the election of that officer. We see that these legislatures can usurp power as well as abuse it. To settle this question, as to the power of the state legislatures, a few remarks only will be necessary. The words of the constitution are, that "each state shall appoint" the electors of President "in such manner as the legislature thereof may prescribe." The state makes the appointment, and the legislature has only the power to prescribe the mode. That the word state means the people of the state is obvious, not only from its ordinary grammatical import, standing contradistinguished from the word "legislature," but also from the commentary contained in the *Federalist*, which, considering the authority of that celebrated exposition, supersedes the necessity of any further argument on this point. In a number written by Mr. Hamilton, relative to the appointment of the President, we find the following decisive words: "They have not made the appointment of President to depend upon pre-existing bodies of men, who might be tampered with beforehand, to prostitute their votes, but they have referred it, in the first instance, to the immediate act of the people of America, to be exerted in the choice of persons, for the temporary and sole purpose of making the appointment." Assuming, then, that the power heretofore exercised by the state legislatures, has been without the warrant of the constitution, I shall proceed to compare the only two remaining modes of voting, that have prevailed in the different states.

The first objection, which I shall urge against the general ticket system, is, that it not only destroys the vote of the minority in the state, but actually transfers the votes, which that minority give in favor of one candidate, to another. We know that in almost every state in the union, there generally exists a division of opinion amongst the people, on the subject of the presidential election. Assuming that the people of New York, for example, should be thus divided in opinion, in the proportion of nineteen thousand for one candidate, and seventeen for another, what, let me ask, is the effect of the general ticket, upon the vote of that state? It forcibly gives the vote of seventeen thousand citizens to the candidate against whom they actually voted. The very votes which the people intended to defeat his election, are by the state wrested from their legitimate aim, and made subservient to the advancement of a man, who may perhaps be an object of abhorrence to the very people who are thus compelled into his service. It is thus, sir, that, under the delusive and mistaken idea of preserving the rights of the states, we sacrifice the fundamental principles of the republican system. We literally immolate the people by thousands and myriads, at the shrine of an ideal phantom. But we shall be told that it is the duty of the minority to submit to the will of the majority. This, sir, is an obvious truth; but I beg gentlemen not to be misled by it. It has no application to the question I am considering. I am not complaining that the minority are compelled to submit, but that all the minorities in the states are annihilated, in making up the general aggregate of the whole union, as if they were immaterial powers in a political equation. And the reason why I do complain of this is, that it gives the minority in the union a chance for ascendancy, equal to that enjoyed by the majority. To show the reality of this danger, I will call the attention of the committee to the difference between the actual popular vote of two large states, and the estimated vote of the same states under the general ticket sys-



tem. I will suppose that New York has one hundred thousand voters, and Pennsylvania seventy-five thousand; that sixty thousand of the voters of New York are in favor of one candidate, and forty thousand in favor of another, and that the whole seventy-five thousand voters in Pennsylvania should give their votes to the candidate who received the New York minority. In this state of things, what is the voice of the people of those states—and what would be the estimated vote, by the general ticket system? The candidate who received one hundred and fifteen thousand popular votes, would actually receive only twenty-eight electoral votes, while his opponent, with only sixty thousand popular votes, would receive thirty-six electoral votes! We are led into error on this subject of minorities, by not distinguishing between things that are essentially different. Wherever the action of a state is final and conclusive upon a subject, as in the election of her own governor, the minority must of course submit; but where the action of all the states of the union is directed to one common result, the election of a President, the respective state minorities should be brought into the calculation, that we may really ascertain who has the genuine majority of the whole. Every friend of the union cannot but perceive a strong objection to the general ticket system, in its tendency to form political parties upon the basis of geographical arrangement. By bringing large political masses into the presidential contest; by arraying state against state in the consolidated energy of their power, feelings and passions unfriendly to the harmony of the union, will be unavoidably generated. It is a fact known to us all, that in almost every portion of the union there is a local feeling, which is but too apt to enter into all political questions affecting the general interests of the republic. Into no question is this feeling more likely to infuse itself than that of the election of the chief magistrate. From this influence it will be generally found, that the majority of the people, in every state, will give their



support to the candidate residing in their own particular section of the union. But there will generally be a minority, respectable in point of numbers, and still more so in point of wisdom and virtue, that will rise superior to local predilections, and look exclusively to the promotion of the national welfare. The unavoidable effect of the general ticket system is to render the sectional feeling to which I have alluded, omnipotent, by entirely excluding the vote of the high-minded minority that would be disposed to resist it. The district system, by giving to this minority its legitimate weight in the election, would tend to put down the pretensions of these political aspirants, who could only hope for success by enlisting local prejudices in their favor. In this respect, the effect of the proposed plan would be to add to the strength and harmony of the union. But if there were no other objections to the general ticket system than those I have thus far urged, I should not regard the proposed change, in this particular, as of vital importance. There remains to be considered, however, an objection which is to my mind perfectly conclusive against the general ticket system. As it is the hinge upon which the contest between the two systems principally turns, I request the particular attention of the committee to this part of the inquiry.

I lay it down, sir, as a truth founded both upon experience, and the nature of things, that wherever the whole mass of the population of a large state vote in common for the electors of President, the whole power of the state will be inevitably thrown into the hands of a few leading politicians, of the predominant party. In the remarks which I shall offer on this subject, I disclaim all allusion to the persons who may have heretofore wielded this power. It is not my intention to find fault with human nature. They have done nothing but what they were driven to do, by the operation of a defective system. It is this system against which I wage war. Neither are the people of a large state to blame for placing power in the hands of a few, nor that few

for assuming and wielding it. With a people, the question is, whether they will give up their influence in the election of President altogether, or establish some central power, clothed with authority to combine, and arrange, and concentrate their common efforts, for a common object. Without this combining power, every one of the fifty or sixty counties in a large state, would perhaps vote for a different list of electors, though they might all desire to elect the same man President. The popular will would be thus defeated, by the irregular and distracted movements of a disorganized mass of voters. In this state of things, a well organized party, consisting of one fifth of the population, would carry its point against the remaining four fifths. With the aid of caucus machinery, a skilful party leader, at the head of five thousand regular voters, would defeat twenty thousand of the untrained multitude. There can be no doubt, sir, that, in the operation of such large masses as must be brought to concur in a common object, under the general ticket system, party discipline is as efficient as military discipline is in the operations of war. These are not theoretical speculations of mine. In what I have uttered on this point, I have done little more than record the experience of every state that has made trial of the system of which I am speaking. When this political organization first takes place, it naturally throws power into the hands of men, who have the confidence of the people, and in all probability, deserve it. But the viciousness of the system consists in its tendency to pervert and change the character of those who control it. This is precisely that sort of power which men are most prone to abuse. When a caucus system becomes firmly established, there naturally grows up the most dangerous and odious of all oligarchies—an oligarchy of intriguers, and political managers. And the people of the state, under the delusive semblance of exercising their highest privilege, do nothing more than go through the empty and unprofitable form of ratifying the decrees



of the sovereign caucus. In the remarks which I have offered, I know I am perfectly understood by the gentlemen from New York, of all parties. They have seen and felt the operations of the system I have been describing, and are almost unanimously, I believe, in favor of abolishing it. That this is the sentiment of the people of New York, we have the most unequivocal evidence. Having but recently thrown off the political incubus, by which they have been almost suffocated, they have very wisely resolved not to establish a system of voting for President, which would render its recurrence certain. The recent vote of the people of New York, in favor of the district system, is sufficient to put to flight a whole host of theoretical arguments against it. I understand that most of the politicians of the state, and nearly all the presses, were opposed to the establishment of a district system there, until a change of the constitution could be effected, making it uniform throughout the union. The ground of opposition was not only plausible, but strong. It was reasonable for New York to refuse to divide her energy, in the presidential election, until other states consent to do the same.

But the people of that state, in opposition to all these considerations, decided in favor of the district system, trusting that the wisdom of other states would induce them to follow the example. On the part of the people of New York, this was a magnanimous sacrifice of state power to political principle. And as far as my observation has extended, the people, in all the states, that have tried the general ticket system, are opposed to it. Having shown that the tendency of the general ticket system is to put the whole elective power of the state into the hands of a few political managers, I need hardly press upon the committee the danger of corrupt influence, in the disposition of that elective power. The danger of corruption is in proportion to the magnitude of the power wielded, and the smallness of the number who wield it. Thirty-six electoral votes, in any probable state of the future



contests for the presidency, would be sufficient to decide the fate of the election. How vastly important would be the vote of such a state as New York; and with what irresistible power might an aspirant to the presidency bring the anticipated patronage of the executive office to bear upon the few, by whom that vote could be controlled? Sir, a stronger case of temptation can hardly be imagined.

But we are told, in answer to all this, that the district system ought not to be established, even to avoid these undeniable evils, because it destroys the just power of the states. What interest can the people of any state have, that their votes should be misrepresented? What they desire is, that their will should be fairly ascertained; according to their suffrages; and the idea that we impair the legitimate power of a state, in the presidential election, by providing a mode of voting that will give us the real will of the people, instead of the artificial will of the state, can never be admitted.

But, sir, if we have only in view the interest, the true and permanent interest, of the predominant parties in the states, it would be the part of wisdom to give to the voice of the state minorities, their fair and proper weight in the election. The party which has the ascendancy this year, may, by a revolution of the wheel of political fortune, fall from their high supremacy, by the next. It is, therefore, worth while to inquire, whether it is expedient for a party, even upon the most selfish principles, to exercise a temporary tyranny over the minority, with a certain prospect of becoming, themselves, at no distant period, the victims of that very tyranny. It is, no doubt, from enlarged considerations of this kind, that the state of New York has acted, in the recent establishment of the district system. In that state, so rapid has been the succession of political revolutions, that almost every party has been up and down, at least half a dozen times. Each having, in its turn, been in the minority, all have learned that the wisest policy is to be just.

And here, sir, I will remark, that it is no small objection to the general ticket system, that it naturally tends, upon the most obvious principles of reaction, to produce sudden and entire revolutions in the power of a state. A very common state of things, in all the states, is a division of parties very nearly equal. The obvious injustice of suppressing entirely the voice of the minority, is the natural basis of a reaction, by which that minority may swell into a majority. Let us suppose, for the sake of illustration, that the state of Virginia should be divided into two political parties, one having the ascendancy by a majority of two or three thousand voters. A change of opinion, in this small number, would produce an entire revolution in the whole vote of the state. These sudden and sweeping vibrations, depending upon such small and inadequate causes, are alone sufficient to demonstrate the defectiveness of the system that gives rise to them. That the state of public opinion, in relation to the general course of this government, must, from this cause, become capriciously mutable, is too obvious to require explanation. The changes in popular opinion, which would hardly be felt if a uniform district system were established, would produce, perhaps, an entire revolution in the administration and measures of the general government, under the other system.

On the question of state power, I would ask, what does any particular state gain by this process of compulsory concentration, through the general ticket, when all the other states avail themselves of the very same process? The question of power, is necessarily a relative question; and, in this view of the subject, it is of no advantage to Virginia, for example, to have the power to transfer the opposing minority to her favorite candidate, when an equal minority, in the very next state, would probably, with equal injustice, be taken from him.

But, Mr. Chairman, the real question which we are called upon to decide, is, whether we will establish the district system, or have no system at all. It is certain,

from the known state of public opinion on the subject, that the people will never consent to the establishment of a uniform general ticket system, by an amendment of the constitution. Shall we, then, rather permit the existing state of constitutional laxity to continue, than adopt the district system?

In estimating the dangers of the present state of things, I have often considered that Providence has been kindly regardful of us, or we should have been long since involved in the most disastrous civil conflicts. Perhaps we owe this fortunate exemption, in a considerable degree, to the moderation and temperance of our national character. But unless the constitution is fixed upon some certain foundation, there is serious ground for apprehending the occurrence of the most delicate and embarrassing question, at no distant period. I will state a case that may probably occur at the very next election, and request gentlemen, if they can, to solve the difficult question involved in it. New York, we know, is now divided into electoral districts, by a law which is admitted on all hands to be constitutional. Suppose the legislature of that state, under the plausible pretext of preventing the division of the elective power of the state, were, on the eve of the next presidential election, to reassume the power which they formerly exercised, and appoint the presidential electors. Suppose the people of the existing districts, maintaining this act of resumption, on the part of the legislature, to be unconstitutional, were to vote for electors, different from those chosen by the legislature, and that, under these conflicting titles, two pretenders should claim the sceptre of executive power. This would be a contest which could only be decided by a civil war, and we should have a commentary on our present system written in blood. This is no imaginary difficulty. I solemnly declare that I am utterly incapable of deciding which of the two competitors would be the real President, and would thank any gentleman for his assistance who thinks he can solve the difficulty. To one candidate I would



say, you have the constitution on your side; to the other, you have on yours the practice of most of the state legislatures, and the acquiescence of the country. And yet the question now presented is different from any that has heretofore occurred, because the law establishing the district system, being clearly constitutional, peculiar ground is furnished for regarding the legislative assumption as an unconstitutional act. Such a question, sir, would never be decided by dispassionate reasoning. Passion, strife, blood—these are the elements that would enter into the argument.

I shall proceed now, Mr. Chairman, to consider an objection to the district system, which I shall examine with more attention, from the respect I entertain for the gentlemen who urge it, than its intrinsic importance would otherwise demand. It is conceived that the proposed system tends to destroy the sovereign rights of the states, and to produce what is denominated consolidation. Now, sir, if I cannot show that the tendency of my proposition is the reverse of that which is ascribed to it in these respects, I will surrender the scheme as indefensible. To a correct understanding of the objection I am considering, a precise and definite conception of the state powers affected by the proposed amendment, is indispensable. As long as we deal in vague generalities, we shall certainly be involved in confusion, if not in error. What, then, are the powers which I propose to take away from the state legislatures? The power of voting directly for the electors of President, which will be admitted to be a usurpation, and the power to change the district into the general ticket system. So far as the proposition tends to prevent future acts of usurpation by the state legislatures, it must be admitted to be salutary. The only power, then, which merits a moment's consideration, is the power of changing the mode of giving the popular vote. Is that a power that ought to belong to any legislative body? Is it not obvious, as well from our own experience, as from the na-

ture of things, that it is a power which will only be exercised abusively, and for the accomplishment of party purposes? What other conceivable purpose can it answer? I will venture to assert, that in every instance in which the district system has been made to give way to the general ticket, party objects have constituted the avowed motive of the change.

But, sir, on this subject of state rights, let me warn gentlemen to beware of running the national bark into the vortex of real danger, while attempting to escape from those which are purely imaginary. They regard the state governments as sentinels standing on the watch-towers of liberty, and yet place those governments in a relation to the general government that must destroy both their fidelity and vigilance. I have shown, sir, that where the general ticket exists, the state legislatures, by nomination or other modes of indication, will, in practice, control and decide the vote of the state for President. By bringing the state legislatures into the operation of choosing the President, you make it the duty of those to sound the alarm of approaching tyranny, who have been themselves instrumental in making the tyrant. It would be just as wise to expect the disclosure of a felony, by a participant in the perpetration of it. The true mode of preserving the guardian vigilance of the state legislatures, is to keep them entirely out of the sphere of the presidential canvass. Let them stand by as disinterested spectators, while the people choose the President. It is thus only that they can be preserved in the attitude of sentinels.

Allow me now, sir, to go a little further on this subject, and ask gentlemen if it has never occurred to them, that the state governments may communicate an artificial energy, a morbid action, to despotism in the general government?

Upon what principle is it assumed that the state legislatures will be always on the side of liberty? Does our experience warrant the supposition? I beg that

gentlemen will do me the favor to open their eyes, and look around them at political events that are passing, almost at the very moment in which I am speaking. Have not attempts been made, during the present session, by the resolutions of state legislatures, to goad our sluggish pace and stubborn temper, into a celerity and pliancy more compatible with the views of the executive government? Such, sir, is the frail security of liberty, when we rely, exclusively, upon holding one power in check by another, instead of subjecting all to the control of the people. The experience of all nations that have made the experiment, demonstrates, that it will eventually result in a meretricious combination between the powers designed to act as checks on each other. What was the real power to which the fathers of the republic looked with dread and apprehension? Not the legislative power of this House, but the power of executive patronage. Upon whom is it that this power is likely to exert the most dangerous influence? Unquestionably, sir, upon small, pre-existing bodies, like the state legislatures, and not upon the mass of the people. The people of a single electoral district, would be more difficult to move, by executive patronage, than the legislature of a whole state. And I will venture to assert, that there is not one of those districts, in the whole union, that could have been induced, without any information on the subject, to instruct their representatives here, to give their support to a particular measure of the executive government. Sir, a President, coming into power, by the aid and concurrence of the state legislatures, would be irresistible. These bodies would lull the People into false security, and, while professing to defend, would actually betray, their liberties. But the most extraordinary objection that I have yet heard urged against the district system, is, its tendency to produce consolidation. What, let me ask, do gentlemen mean by the term consolidation? Do they use it as synonymous with union? If that be the case, I admit that the tendency of the district system will be to "consoli-



date the union ;” the very thing which the father of his country declared to be the primary aim of the federal convention, in framing this government. But that consolidation, which is really dangerous to liberty, and which would destroy the federative character of our government, is the concentration of power in the government here. In this sense of the term, I deprecate consolidation as much as any man, and the tendency of my proposition is to produce a result almost precisely the reverse of this. Instead of concentrating power in the hands of the government here, it diffuses the most important of all powers among the great body of the people, and fixes it there irrevocably.

It seems to me that a new reading of state rights is now, for the first time, introduced. I have always regarded state rights as standing in contradistinction to the powers of the general government. But now the rights of the states are brought out in array against the rights of the people. How can it be conceived that we impair the rights of a state, by vesting the highest prerogative of sovereignty in the people of that state? Virginia, voting by districts, is Virginia still—divested of none of her attributes, as a separate member of the confederacy. God forbid that I should propose any thing so absurd as to break down the barriers which separate her from the rest of the union, and let in any foreign influence to control her political operations. I do not propose to impair the federative character of the government in the slightest degree. Each state will give precisely the same number of electoral votes for the President that she is now entitled to give, under the existing provisions of the constitution.

But the concluding argument which I shall urge in favor of the district system, is this: the small states will never consent to give up their eventual equality in voting for the President, in this House, unless the large states will consent to break their power of concentration and combination, by the establishment of

the district system. In reference to this indispensable compromise, all the arguments, which go to demonstrate the expediency of depriving this House of the contingent power of voting for the President, are so many arguments in favor of the district system.

This brings me to the consideration of the second and incomparably the most important branch of the amendment—that which provides, that, in the event of a failure of the primary electoral vote to decide the election, the two highest candidates shall be referred back to the people, instead of referring the three highest to the House of Representatives.

In entering into the investigation of this part of the plan, which illustrates the genius of the whole amendment, I propose to develope what I deem to be the true principle of liberty, in the organization of our system of government. In all the free governments that have existed, it will be found, upon examining their structure philosophically, that their liberty was resolvable into some fundamental principle, and that the final loss of that liberty was owing to some inherent defect in that fundamental principle. The great conservative principle, then, that pervades and sustains the whole machinery of our government, is the responsibility of public functionaries to the people. From its exact analogy to the principle which sustains the harmony of the material universe, it may be appropriately denominated the gravitation of our political system. And in looking forward to the brilliant and glorious destinies that open upon his vision, the hopes of the American patriot will cling to this as the safe and steady anchorage that will enable us to ride out the storms that have overwhelmed the liberties of all other republics. It results from the very nature of our scheme of government, that, in proportion as the power of the functionary is increased, should be the directness and efficiency of his responsibility to the people. Responsibility and power are the antagonist principles of the system, and its perfection consists in their equipoise. Without this equipoise, the eccentric

movements of power will as inevitably destroy our free system of government, as the suspension of the centrifugal or centripetal power in the planetary system would destroy the equilibrium of the universe. If we will attentively consider the nature and tendency of executive power, we shall be satisfied, that, of all the kinds of power that enter into the system of government, none requires so decidedly the restraining influence of the principle of responsibility. There is no power more active, encroaching and dangerous, operating as it does, through the influence of its patronage, upon the hopes and fears of a large portion of the community. But by rendering the President directly responsible to the people, we shall solve the great problem, never before fully realized, of uniting in the government of so extensive a country, the elements of liberty and power. All the essential powers of sovereignty may be safely entrusted to a government emanating directly from the people upon whom it is to operate. In this particular, ours is distinguished from most of the free governments that have been known to history. Every attempt to secure liberty by withholding those powers which are necessary for the defence and security of the nation, must speedily end in the loss of that liberty. They have always ended so. No generous and high-minded people can long tolerate the existence of a government that is not capable of defending them. Such a government is inevitably destined to pass from a rickety state of feebleness and distraction, through anarchy, to despotism. Hence the importance of that peculiar organization, which enables us to clothe the President with such extensive powers, and without endangering public liberty.

What are the powers actually vested in the President? We can hardly realize the fact, though it is unquestionably true, that he possesses very nearly as extensive powers as the king of England. In distributing power to the different departments of the government, the framers of the constitution have very



specifically defined the powers of Congress, but given an almost unlimited charter to the President. Where is the limitation of his power? The grant is of "all executive power;" which amounts to neither more nor less than that he shall have power to do whatever any other executive on earth may do, unless restricted expressly, or by the necessary implication growing out of the grants to the other departments. The President cannot declare war, because that power is expressly delegated to Congress; and this is the only material power possessed by the king of England, that is not vested in the President. Nor will this be regarded as a very considerable practical difference, when it is considered that the king of England never declares war until he is assured the parliament will sustain the measure.

Sir, our own experience will exclusively demonstrate how delusive it would be to rely for the security of our liberty, upon restrictions on the executive power. When we pass a law, by the concurrence of all the branches of the legislative power, for the internal improvement of the country, we are told that we have transcended the limits of the constitution, to the imminent jeopardy of public freedom; but when the President, by virtue of the treaty-making power, buys an empire to the west and adds it to the republic, we are told that there is no limit to the treaty-making power but the discretion of the executive, and that a treaty is the supreme law of the land.

It is obvious, therefore, from this view of the undefined and illimitable nature of executive power, that all barriers restrictive of that power, would be utterly nugatory and contemptible, without a well connected system of responsibility. It has not been my object, in pointing out the character and extent of executive power, to hold it up as an object of alarm. I am far from regarding power as, in itself, an evil. On the contrary, I view it as the indispensable means of conferring the greatest national blessings. What I dread is the abuse of power. Show me political power so effectually guarded, that it will certainly be exerted for

the promotion of the welfare of the republic, and I will love and idolize it. According to these views, it is my object to infuse into the executive government that salutary energy which can only be derived from the confidence of the people. Without that confidence, a President cannot do much good; with it, he can scarcely do much evil.

While discussing the connexion between liberty and power, it is a consolation to reflect, in the present militant state of free principles in the civilized world, that liberty is as essential to power, as power is to liberty. In fact, the sentiment contained in the message of the President, at the opening of the session, that "liberty is power," is strictly and philosophically true. In the improved state of the art of war in modern times, the power of a nation is measured by its financial capacity. This capacity of course depends upon the wealth of the nation, and that again upon the stimulus applied to industry by the security to property derived from free institutions. On the contrary, the precarious tenure of property, and every other blessing in despotic governments, paralyzes individual industry, and results in national poverty. Power itself becomes thus the principle of liberty. Despotic rulers, finding their military power sinking through their finances, will be driven to the alternative of giving freedom to their subjects, or falling before the superior power of free states. The extraordinary power which England has exerted in the affairs of modern Europe, is at once the illustration and the proof of these remarks.

Having shown the efficacy of the principle of elective responsibility, in harmonizing the action of liberty and power, I shall proceed to take a brief view of the principles of freedom that have characterized other free governments, and their comparative efficiency.

The only two forms in which freedom was known to the ancients, were absolute democracy, and a balance of orders. From its very nature, a simple democracy is destined to a turbulent and temporary ex-

istence and violent death. The assemblage of the great mass of a political community, to deliberate and decide upon affairs of the deepest moment, must unavoidably give rise to scenes of tumultuous violence and outrage, utterly incompatible with the idea of regulated and permanent freedom. While we recognize, in the fate of Athens, the inevitable catastrophe of that imperfect form of government, our attention is forcibly drawn to the striking contrast of our political condition, and our absolute exemption from a similar destiny.

The balance of orders, as it existed in the Roman government, was a principle of perpetual conflict and violence. It exhibited the extraordinary spectacle of two incompatible sovereignties in the same state—the power of the patricians, and that of the popular tribunes—each having a right to act independently, and yet subject to a mutual and irregular control, which ultimately led to the overthrow of the republic. In looking back upon the catastrophe of Roman freedom, we confidently say, it was inevitable. The system contained within itself the principle of its own destruction. Wherever power is brought into conflict with power, in any political system, without an ultimate responsibility in both, to the people, anarchy and blood are but the precursors of despotism. It was not Cæsar that destroyed the liberties of Rome. They had expired before he crossed the Rubicon. The people, exhausted and corrupted by the bloody conflicts, and vicious practices of Marius and Sylla, required and called for a master. If Cæsar had not seized the derelict helm, another would. In the United States, fortunately, we have not the basis of a balance, by the division of society into distinct orders. Our population is homogeneous. All our citizens are, in point of political rights and privileges, equal. It results as a necessary consequence, that we must introduce a new principle of freedom, different from those which existed in either Greece or Rome. It is this necessity, connected with a corresponding capacity



for a new principle of political organization, that constitutes our distinguishing superiority.

The principle of elective responsibility, by which, instead of checking one power by another, equally vicious, the whole mass of society, which is necessarily virtuous, is brought to bear upon the public functionary, is the renovating, self-sustaining principle of our liberties. If this principle be properly extended through our political system, it is formed for endless duration. It is impossible to foresee any catastrophe that can terminate our liberties, while resting on this basis. The people are essentially patriotic. With them, selfishness itself is public virtue. By the laws of moral necessity, they are obliged to will their own happiness. In exercising the high privilege of choosing the man who is to preside over their destinies, they must, from the same moral necessity, select the candidate whom they believe best qualified to promote the welfare of the republic. Nothing, therefore, can prevent our country from obtaining, under the auspices of this principle of representative responsibility, the highest degree of political happiness, but a want of intelligence in the people.

This brings me to the consideration of an objection, founded on this supposed want of intelligence, that is often urged against that part of the proposed amendment which makes the ultimate choice of the President to depend on the immediate act of the people. I am not, I trust, one of those visionary advocates of the abstract rights of man, that would extend the power of the people further than is conducive to the happiness of the political society. It is idle to suppose that the people can have any rights incompatible with their own happiness. Although, therefore, I have shown, that they are necessarily virtuous from their position, yet I admit that patriotic intentions would furnish no adequate security for the wise selection of a chief magistrate, in the absence of sufficient intelligence. It would be a vain and delusive mockery to invest them with an elective power, which they could

only exercise to the destruction of that which is the end of all government—the national good. There is no political truth more worthy of the attention of a practical statesman, than that the freedom of a people cannot rise higher than their intelligence. Such is the indispensable condition of freedom; and all the attempts which have been made in modern Europe, to render government more free than the intelligence of the people would warrant, have resulted in bloody and disastrous reaction. I do not hesitate, therefore, to admit that the people have no abstract right to any power, which they cannot exercise with intelligence. Is it true, then, that the people of the United States have not sufficient intelligence to choose the President?

On this subject, we are told that history furnishes no example of a chief executive magistrate chosen directly by the great mass of the people. This, sir, is a melancholy truth; and it furnishes the true solution of the fact, that there never has existed a republic that has not lost its liberty.

It is easy to demonstrate, that, previous to the establishment of this government, liberty never had any thing like a fair experiment. This, sir, will conclusively appear, when we come to consider historically and philosophically the causes, why it is that the chief magistrate of an extensive country never has been chosen by the great body of the people. How, then, has this happened?

As all the governments of modern Europe had their foundations laid in the principles of the feudal system, the only experiments upon the republican system, which deserve to be recorded in history, are those made by the ancients.

Now the election of a chief magistrate, by the mass of the people of an extensive community, was, to the most enlightened nations of antiquity, a political impossibility. Destitute of the art of printing, they could not have introduced the representative principle into their political systems, even if they had understood it.

In the very nature of things, that principle can only be co-extensive with popular intelligence. In this respect, the art of printing, more than any invention since the creation of man, is destined to change and elevate the political condition of society. It has given a new impulse to the energies of the human mind, and opens new and brilliant destinies to modern republics, which were utterly unattainable by the ancients. The existence of a country population, scattered over a vast extent of territory, as intelligent as the population of the cities, is a phenomenon which was utterly and necessarily unknown to the free states of antiquity. All the intelligence, which controlled the destiny and upheld the dominion of republican Rome, was confined to the walls of the great city. Even when her dominion extended beyond Italy to the utmost known limits of the inhabited world, the city was the exclusive seat both of intelligence and empire. Without the art of printing, and the consequent advantages of a free press, that habitual and incessant action of mind upon mind, which is essential to all human improvement, could no more exist, amongst a numerous and scattered population, than the commerce of disconnected continents could traverse the ocean without the art of navigation. Here, then, is the source of our superiority, and our just pride as a nation. The statesmen of the remotest extremes of the union can converse together, like the philosophers of Athens, in the same portico, or the politicians of Rome, in the same forum. Distance is overcome, and the citizens of Georgia and of Maine can be brought to co-operate in the same great object, with as perfect a community of views and feelings as actuated the tribes of Rome, in the assemblies of the people. It is obvious, from these views of the subject, that liberty has a more extensive and durable foundation in the United States, than it ever has had in any other age or country. By the representative principle—a principle unknown and impracticable among the ancients, the whole mass of society is brought to operate, in constraining the ac-



tion of power, and in the conservation of public liberty. The extent of territory, which, by the operation of fixed and obvious laws, caused the Roman republic to sink under its own cumbrous weight, is our best security against a similar catastrophe. The extensive provinces of that republic, incapable of being brought into the constitutional action of the political system, presented a mass of unenlightened brute force, unconnected with the republic by political sympathy or interest, and ready to be wielded by any military adventurer, for the overthrow of public liberty.

In adverting—and I do it with peculiar pleasure—to the situation, and probable destiny of the United States, as contrasted with those of other nations, I would ask, emphatically, what would be the condition, what the security of our liberty, if it were dependent upon any single city? Sir, all cities, however intelligent and virtuous, must, from the very structure of their society, have a populace of greater or less extent, which, when roused to action, by any extraordinary excitement, are impelled by mutual sympathy, and the contagion of feeling, resulting from contact, to acts of turbulence, riot and outrage. In a word, they degenerate into a tumultuous rabble. I will take Boston for an example, as furnishing the strongest illustration—a city, which I cannot mention, without having excited in my breast strong emotions of reverence, connected with the proudest recollections of our revolutionary history. In this city, sir, inhabited by the unmixed descendants of the genuine old English puritans; in this city, distinguished for the general intelligence, and steady, moral and religious habits of its citizens; in the cradle of American liberty, and the emporium of American literature and arts, what is the spectacle we have recently witnessed? We have seen a miserable, strolling player, an outcast from his native country, throw the whole city into a scene of riotous commotion, that might have swept away the liberties of the republic, had they depended upon so frail a security. But, I thank God, that the liberties of this

country do not rest upon the trembling and unsteady basis of any city; neither Athens, nor Rome, nor Boston—but on the intelligence of the great mass of the people, scattered, as they are, over our widely extended surface.

In pointing out the prominent circumstances that distinguish us from other nations, I will briefly call the attention of the committee to two other causes, of the superior political capability of the people of the United States, which deserve to be considered. The one is the abolition of the rights of primogeniture, which distinguishes us from the nations of modern Europe; the other is the substitution of machinery for manual labor in the arts, which distinguishes us from the ancients. A celebrated writer of Scotland, now living, I believe, expressed the opinion, that the abolition of the laws of primogeniture, in Europe, would do more to improve the political condition of its inhabitants, than any other measure which the wisdom of man could suggest. Though I am not prepared to say whether the experiment there, would be worth the blood and confusion it must inevitably create, I feel no difficulty in saying, that, next to the art of printing, it is the most indispensable condition to a system of government founded upon representative responsibility. By diffusing property, it produces a corresponding diffusion of intelligence among the mass of the people, and supersedes the existence of an aristocracy, that would necessarily require a balanced government, or be productive of anarchy.

The other circumstance to which I alluded, the introduction of machinery, instead of manual labor, has been the subject of great misapprehension. It has been supposed to be adverse to liberty. But it must be extremely obvious, that a machine, which will enable one man to perform the labor of a hundred, disengages ninety-nine persons from the necessity of manual labor, and leaves them free to improve their minds. The aggregate of popular intelligence is thus increas-

ed, in proportion to the saving of labor effected by machinery.

All these causes combined, have given us a population, equal, in the mass, to what the politicians of Europe regard as the best part of their society—the middle interest. As intelligence is thus generally diffused among the people, the object of the proposed amendment is to establish such an organization of the elective system, as will enable this diffused intelligence to operate freely and steadily upon the most active and dangerous part of the machine of government. It is the natural prerogative of intelligence to govern. Even when that intelligence is confined to a small class, it always obtains the ascendancy. Nothing, therefore, but the grossest imperfection in our political organization, can prevent it from exerting its legitimate influence, when sustained by the physical power of society.

Upon the question of the capacity of the people to choose the chief magistrate, I would remark that the citizens of all free countries have been found competent to the selection of the highest officers. For the last half century, the talent that has governed England, notwithstanding her artificial distinctions, has been brought forward by the people, and has made its way to power through the house of commons. Of the distinguished statesmen who have figured in her councils during that period, I know scarcely a single exception. Pitt, Castlereagh and Canning, were all indebted to the people for their political elevation, and it is certain that no statesmen, in modern times, have exerted a more decisive influence over the current of human affairs; whether for good or for evil, it is not now material to inquire. But, sir, let us come a little nearer home, and consult our own experience upon this point. Out of the six Presidents who have been called to preside over the republic, five have been the unquestionable choice of the people of America. Looking back upon the history of the past, with the impar-



tiality of posterity and the benefit of subsequent experience, we can have no hesitation in admitting, the selection of the people has been the very best that could have been made. In fact, such is the course of political service through which a statesman must ordinarily go, before he can venture to aspire to the Presidency, that it would not be going too far to say, that the people are more capable of selecting that officer, than almost any other public functionary. It is much easier to form a just estimate of a statesman, by palpable measures of wisdom and foresight, than to discover and bring to light latent capacities that have never been exhibited in the theatre of political action.

But, sir, let us, for a moment, compare the Presidents chosen by the people with the officers chosen by those Presidents. It is a subject of curious speculation, and will lead us, I think, to a very decided conclusion, that the people are more capable of choosing the President, than the President would himself be to choose his successor. Sir, what criterion of talent have our Presidents adopted in the organization of their cabinets? They have either adopted the popular standard, and promoted those who had been previously distinguished, or they have exhibited the most signal infelicity in their choice. How many instances can be shown of statesmen of first talents, brought into the executive government, who had not first distinguished themselves here as the immediate representatives of the people? I will particularly refer to the administration of Mr. Madison, for whose character, as a profound statesman, I entertain the highest respect. He was, at the same time, a monument of the capacity of the people to choose public agents, and of the frailty of any other reliance. For, if I may speak with the freedom of history on such a subject, his cabinet was most wretchedly feeble, and from no cause more strikingly so, than from the attempt to discover the secret trea-

sure of talents that had escaped the searching sagacity of the people.

It is not unworthy of remark, that there is no officer in whose election the people are so likely to be actuated exclusively by patriotic and elevated motives, as in that of the President of the United States. Personally unknown to the great body of them, and seen only through the medium of his deeds and his character, they can have no personal predilection or interested motive, to swerve them from the dictates of wisdom and patriotism. On the contrary, in the election of mere local officers, and particularly those ministerial officers of the law, whose official duties have a bearing upon the pecuniary interest of the debtor and creditor classes of the community, it not unfrequently occurs that even the people are actuated by factious motives. And this from the only cause that can produce such motives—the existence of an individual interest in the election, different from the public interest, and paramount to it.

But, sir, I must hasten to consider another objection that has been urged against referring the election of the President directly to the people. We have been told from high authority—an executive message of one of the states—that it will produce popular excitement and turbulence. It does really appear to me, sir, that the grave statesmen of the country are mistaking, on this subject, the images of their classic recollections, for the sober and substantial realities of life. They seem to forget that they are not walking in the groves of Athens, nor mingling in the conflicts of the Roman Comitia. They permit themselves to be carried away by false and delusive analogies. I believe it would be a vain attempt to try to rouse the people to scenes of turbulence and strife, on the subject of the presidential election. The extent of our territory, and the dispersion of our population, circumstances once deemed incompatible with republican freedom, are our absolute guarantees against those stormy

commotions that distinguish the history of simple democracies. I do not believe it would be possible to excite even Boston to a riot on the subject of the presidency, although Kean, the player, roused the mob to acts of violence: for, by the district system, Boston would only have one electoral vote, and that would scarcely be an object of sufficient magnitude to produce such consequences.

This idea of exciting the people to violence on the presidential election, is founded on absolute inattention to the situation of our country, and would be scarcely excusable in a youth at college, in his sophomore year. I will appeal to the experience of every member on this floor, and ask whether he has ever heard of a solitary instance of popular outrage on this subject? No, sir; in ten presidential elections we have given a practical refutation of the unfounded imputations that have been cast upon the republican form of government in this respect. I will venture to assert, and I speak in the hearing of those who have been eye witnesses of the fact, that a single parliamentary election for Westminster has produced more popular excitement, and violence, and outrage, than all the presidential elections since the foundation of our government. No American citizen has ever felt the slightest apprehension of outrage in the exercise of his elective franchise. The very humblest among us, marches to the polls with more confidence and security than even the prime minister of England. I have a friend in my eye who witnessed a Westminster election—and it was regarded as an extraordinary instance of rashness, even in lord Castlereagh, a minister remarkable for his nerve, to vote for the ministerial candidate, in the state of outrageous excitement that existed. But, even that minister, after giving his vote, was under the necessity of consulting his own personal safety, by skulking in his robes of office precipitately from the hustings, like a felon. And yet, the turbulence of republics, and the danger of popular violence, are the perpetual themes of declamation, as applicable to this



country, where every thing around us looks more like the calm of death. It is idle to talk about popular violence. There is not a nation on the face of the globe, whatever may be its form of government, that is so completely exempt from such an imputation.

What, sir, has been the fact, as exemplified in the occurrences of the recent election? However we may differ upon other questions connected with it, I believe few will dispute the fact, that the popular favorite, the undoubted choice of the nation, was not chosen by this House. This House disregarded the will of the people; and yet they have exhibited no indications of outrage, but have borne their disappointment in the very spirit of philosophical resignation. They have submitted, as they ought to have submitted, to the constitutional authority, with the stern dignity of freemen, who understand their duties, and know how to vindicate their rights. In any other country, if a military chieftain had been the object of popular admiration and confidence, and defeated by the legislative body, some Cromwell or Bonaparte would have stepped forward, and dissolved the contumacious assembly, and erected a throne of usurpation on its ruins.

But, sir, I not only maintain that the people are exempt from the charge of violence, but that there is a tendency to carry the feeling of indifference to public affairs to a dangerous extreme. From the peculiar structure and commercial spirit of modern society, and the facilities presented, in our country, for the acquisition of wealth, the eager pursuit of gain predominates over our concern for the affairs of the republic. This is, perhaps, our national foible. Wealth is the object of our idolatry, and even liberty is worshipped in the form of property. Although this spirit, by stimulating industry, is unquestionably excellent in itself, yet it is to be apprehended, that, in a period of peace and tranquillity, it will become too strong for patriotism, and produce the greatest of national evils—popular apathy.

We have been frequently told, that the farmer should attend to his plough, and the mechanic to his handicraft, during the canvass for the presidency. Sir, a more dangerous doctrine could not be inculcated. If there is any spectacle from the contemplation of which I would shrink with peculiar horror, it would be that of the great mass of the American people, sunk into a profound apathy, on the subject of their highest political interests. Such a spectacle would be more portentous to the eye of intelligent patriotism, than all the monsters of the earth, and fiery signs of the heavens, to the eye of trembling superstition. If the people could be indifferent to the fate of a contest for the presidency, they would be unworthy of freedom. If I were to perceive them sinking into this apathy, I would even apply the power of political galvanism, if such a power could be found, to rouse them from their fatal lethargy. Keep the people quiet! Peace! peace! Such are the whispers by which the people are to be lulled to sleep, in the very crisis of their highest concerns. Sir, 'you make a solitude, and call it peace!' Peace? 'Tis death! Take away all interest from the people, in the election of their chief ruler, and liberty is no more. What, sir, is to be the consequence? If the people do not elect the President, some body must. There is no special providence to decide the question. Who, then, is to make the election, and how will it operate? You throw a general paralysis over the body politic, and excite a morbid action in particular members. The general patriotic excitement of the people, in relation to the election of the President, is as essential to the health and energy of the political system, as circulation of the blood is to the health and energy of the natural body. Check that circulation, and you inevitably produce local inflammation, gangrene, and ultimately death. Make the people indifferent; destroy their legitimate influence, and you communicate a morbid violence to the efforts of those who are ever ready to assume the con-

trol of such affairs—the mercenary intriguers and interested office hunters of the country. Tell me not, sir, of popular violence! Show me a hundred political factionists—men who look to the election of a President, as the means of gratifying their high or their low ambition—and I will show you the very materials for a mob, ready for any desperate adventure connected with their common fortunes. The reason of this extraordinary excitement is obvious. It is a matter of self-interest, of personal ambition. The people can have no such motives. They look only to the interest and glory of the country. There was a law of Athens which subjected every citizen to punishment, who refused to take sides in the political parties which divided the republic. It was founded in the deepest wisdom. In political affairs, the vicious, the ambitious, and the interested, are always active. It is the natural tendency of virtue, confiding in the strength of its own cause, to be inactive. It hence results, that the ambitious few will inevitably acquire the ascendancy, in the conduct of human affairs, if the patriotic many, the people, are not stimulated and roused to a proper activity and effort.

Patriotism itself is a cold and inefficient principle, with the mass of mankind, unless it is an active passion. The people must be brought to act with the ardor of affection. It will not suffice that they feel a cold philosophical attachment to the abstract forms of freedom—they must be alive and active. No nation ever attained to high political destinies, without the operation of causes, producing great national excitement. A slumbering nation never achieved any thing worthy to be remembered or recorded, either as regards liberty or power. Who would not be a Roman, in spite of all the ambition, and violence, and strife, through which that republic marched to greatness, rather than a luxurious and degenerate Persian? Who would not be an Englishman, notwithstanding the vicissitudes of blood and conquest, that chequer



the history of that country, rather than an effeminate Chinese, with all the tranquillity and peace of despotism?

Both individuals and nations attain to a moral elevation proportioned to the magnitude of their efforts, and the disinterested magnanimity of the impulse under which they act. It is the necessary condition of all high national qualities, that the people are brought to act in reference to some common object. Let us bring them to the wholesome, instructive and habitual exercise of choosing their chief magistrate. They must be trained and educated to freedom. They must learn the duties of freemen as they learn every thing else. You can no more make a freeman than you can a shoemaker, without practical instruction. There are some, sir, who think that freedom requires nothing more than the manufacture of a paper constitution. They seem to suppose that all will be safe, if the parchment is smooth, and the phraseology clear. Sir, unless you lay the foundation of freedom in the structure and education of society, I would not give a rush for the delusive mockery of a paper constitution. A written charter is the evidence, but not the source of liberty.

In this view of the subject, a strong recommendation of the proposed amendment, is the effect it will produce on the people themselves. We have recently seen, in France, that the people are incapable of exercising the right of trial by jury, though they are scarcely less intelligent than the English, who have exercised that important right, with great wisdom, from the remotest period of their history. The cause is obvious—the people of France have not been accustomed to exercise these rights.

Nor will the effect be less important which will be produced upon the person elected President, than it is upon the people who elect him. There is no more effectual corrective of a disposition to despotism, than the consciousness of being the object of the confidence and love, and admiration, of a great, intelligent and

virtuous nation. The moral elevation, arising from the idea of being loved and venerated, by those whose destinies are committed to his charge, would convert even a tyrant into the father of his country. It is not in nature for a sovereign to tyrannize over a people who love him. Even in spite of himself, he will be awaked to sentiments of magnanimity and patriotism, by the warmth of popular affection, and the unbought demonstrations of gratitude. But how different is the situation of a man, elevated to power, by factious combination, by force or fraud, in opposition to the national will. Why, sir, was Nero a tyrant? Not from the native impulse of his heart, but from his situation. He knew that the people deprecated his power and despised his person. It would have been unnatural, therefore, if he had not become a tyrant, however amiable his natural disposition. We cannot love those long who do not love us. A ruler, who knows that he is hated by the people, reciprocates the popular hatred, and looks to his faction for support. He relies exclusively upon political management and intrigue, to sustain his power.

Such, sir, are the natural consequences of acquiring power, not by high-minded and honorable actions, but by the pitiful, petty-larceny artifices of intrigue and corruption. There is something essentially degrading in this mode of obtaining power. If I know my own heart, I could not be tempted to use such mean and paltry arts even to obtain the control of a nation's destinies. But if I could be so tempted, I should feel myself unworthy to be any thing but a tyrant. God forbid, then, that we should voluntarily place it in the power of men to raise themselves to dominion, by such means. Let us not expose them to the temptation.

I come now, Mr. Chairman, to what I regard the most important consideration connected with this branch of the amendment: the expediency of excluding this body from all agency in the election of the President.

I will, however, first draw the attention of the committee to a very striking incongruity of principle, involved in the provision to refer that election to this House. The three highest candidates, indicated by the popular vote, are referred to the House of Representatives. Upon what principle? Is it because this body has more capacity for selection than the people? Admit this to be the fact, and what follows? You call in a competent body to select a President out of three persons chosen by those whom the argument supposes to be incompetent. If the people are capable of voting for three, why not for one? Upon what metaphysical or mathematical principle is it, that the people are capable of choosing three persons, one of whom must be President, and are not capable of going another step, and choosing the one of those three who is to wield the sceptre? If the House of Representatives have any superior capacity, you do not give them a sufficient latitude of discretion to exercise it to any effectual purpose. In a word, the scheme combines the disadvantages of both modes of election, and the advantage of neither, giving to this House just sufficient latitude for all the purposes of corruption, and not enough for any good end.

The first objection, that I shall urge against the participation of this House in the election of the President, is its tendency to destroy that separation of the legislative from the executive department of the government, that is indispensable to the effective responsibility of the latter. From the very nature of executive power, its operations are unseen by the people. Acting, not like Congress, by general laws, that are regularly promulgated, the President expends money, confers offices, and regulates the distribution of armies and navies—acts silently performed, and of which the people can have no precise knowledge, that is not derived from their representatives here. We ourselves can only see the movements of executive power, dimly and imperfectly, through the lumbering masses of documents on our tables. It is not to be expected



that this body will be inclined to enforce a very rigorous accountability, against the President of its own creation. Instead of standing to the executive in the relation of an independent, co-ordinate department, it becomes the partisan of his power, and the apologist for his transgressions.

Another effect which must certainly result from the habitual interference of this House in the election of the President, is the degradation of its legislative character. Instead of statesmen, profoundly versed in the sublime art of rendering the republic flourishing and happy, the members of this House will degenerate into mere managing politicians, trained in the little arts of intrigue. Instead of devoting ourselves to the peculiar and appropriate duties of our station, the making of laws, we shall be exclusively engrossed in making Presidents.

When the members of Congress become arrayed into cabals, designated by the names of the several candidates for the presidency, there will be an end both of our dignity and independence. I have no occasion, sir, to be ashamed of any man whose pretensions I have sustained for the presidency; but every principle of my nature recoils at the idea of being characterized by the name or livery of any man living. A state of things will soon occur, in which the great politicians of the country will be those who are most dexterous at making political combinations, and public men will devote themselves to the huckstering arts of gaining power, instead of studying the more dignified art of using it wisely.

It cannot be disguised, sir, that, by bringing the election of the President into this House, we expose ourselves to the influence of those arts of political courtship, which the ambitious have ever been prone to practice. To say nothing of corruption, there are few among us, strongly as they may feel intrenched behind their own dignity, who are not liable to have the sternness of their purposes relaxed by a condescending smile, or an act of executive confidence, or—a dinner.

These little arts, which in their combined operation, constitute what is usually denominated intrigue, are the means by which cunning aspirants address themselves to the vanity and foibles of those who fall within the sphere of their fascination. The people, sir, cannot be reached by these arts; but we, their wise and virtuous representatives, thrown into the fatal circle, fall victims to an influence of which we are not ourselves conscious. It is in vain, sir, to dissemble. We may shroud ourselves in wise looks and a dignified exterior, but we are perhaps laboring under the fatal charm of the enchantress, at the very moment we are indignantly disclaiming it.

The peculiar circumstances, under which the presidential election will generally come before the House of Representatives, constitute a very striking objection to the exercise of the power now vested in this body. The election comes here with almost a certainty, that, in nine cases out of ten, it will be decided against the will of the people. The small minorities will naturally combine against the popular favorite. They will do this upon principles as certain in their operation as gravitation. The man, who is conscious that he is the choice of the people, stands firm and inflexible in the confidence of his own strength. You cannot approach him. He disdains to negotiate. He feels his title to be strong, and confidently reposes upon it. All the other candidates naturally regard him as the obstacle that stands most in the way of their hopes. United by their very feebleness, they defeat the will of the nation. For accomplishing this object the mode of voting here affords extraordinary facilities. We vote by states. The natural course of things will throw the whole power of the combination upon the small states. A single member is more easily brought into the arrangement than thirty-six. It may thus happen that less than forty members of this body, will elect the President. This strong probability that the President will be chosen by a small minority of

Congress, demands the most serious and solemn consideration.

Under what circumstances do you call him to the discharge of the high duties of his office? You place a sceptre in a hand which has not energy to wield it. The unavoidable consequence will be, that the whole patronage of his administration will be perverted to the purpose of sustaining and strengthening his popularity. He comes into power under circumstances that create a political necessity of acting in this manner. Destitute of the confidence of the people, he must feel that his patronage is his power. This view of the subject brings me to the consideration of the great and conclusive objection to the interference of this House in the election—its tendency to corrupt the legislative body.

Corrupt Congress, and you assail liberty in the very seat of its vitality.

But, sir, we are apt to treat the idea of our own corruptibility, as utterly visionary, and to ask, with a grave affectation of dignity—what! do you think a member of Congress can be corrupted? Sir, I speak what I have long and deliberately considered, when I say, that since man was created, there never has been a political body on the face of the earth, that would not be corrupted under the same circumstances. Corruption steals upon us in a thousand insidious forms, when we are least aware of its approaches. Of all the forms in which it can present itself, the bribery of office, is the most dangerous, because it assumes the guise of patriotism to accomplish its fatal sorcery. We are often asked, where is the evidence of corruption? Have you seen it? Sir, do you expect to see it? You had as well expect to see the embodied forms of pestilence and famine stalking before you, as to see the latent operations of this insidious power. We may walk amidst it and breathe its contagion, without being conscious of its presence. All experience teaches us the irresistible power of temptation, when vice assumes the form of



virtue. The great enemy of mankind could not have consummated his infernal scheme for the seduction of our first parents, but for the disguise in which he presented himself. Had he appeared as the devil, in his proper form; had the spear of Ithuriel disclosed the naked deformity of the fiend of hell, the inhabitants of Paradise would have shrunk with horror from his presence. But he came as the insinuating serpent, and presented a beautiful apple, the most delicious fruit in all the garden. He told his glossing story to the unsuspecting victim of his guile. "It can be no crime to taste of this delightful fruit. It will disclose to you the knowledge of good and evil. It will raise you to an equality with the angels." Such, sir, was the process; and in this simple but impressive narrative, we have the most beautiful and philosophical illustration of the frailty of man, and the power of temptation, that could possibly be exhibited. Mr. Chairman, I have been forcibly struck with the similarity between our present situation and that of Eve, after it was announced that satan was on the borders of Paradise. We, too, have been warned that the enemy is on our borders. But God forbid that the similitude should be carried any further. Eve, conscious of her innocence, sought temptation and defied it. The catastrophe is too fatally known to us all. She went, "with the blessings of heaven on her head, and its purity in her heart," guarded by the ministry of angels—she returned, covered with shame, under the heavy denunciation of heaven's everlasting curse.

Sir, it is innocence that temptation conquers. If our first parent, pure as she came from the hand of God, was overcome by this seductive power, let us not imitate her fatal rashness, by seeking temptation, when it is in our power to avoid it. Let us not vainly confide in our own infallibility. We are liable to be corrupted. To an ambitious man, an honorable office will appear as beautiful and fascinating as the apple of Paradise.

I admit, sir, that ambition is a passion, at once the

most powerful and the most useful. Without it, human affairs would become a mere stagnant pool. By means of his patronage, the President addresses himself in the most irresistible manner, to this, the noblest and strongest of our passions. All that the imagination can desire—honor, power, wealth, ease, are held out as the temptation. Man was not made to resist such temptations. It is impossible to conceive, satan himself could not devise, a system which would more infallibly introduce corruption and death into our political Eden. Sir, the angels fell from heaven with less temptation.

That cannot, then, be a wise political organization, that requires us to resist temptations too strong either for men or angels.

The political truths I have advanced will be fully sustained by the authority of history. Look back, sir, into the vast and dreary solitude of past ages, and read the epitaphs which impartial history has inscribed on the tombs of fallen republics. What is the melancholy lesson they teach us? That no free government has been overcome by force, but all by corruption. If we ever lose our liberties, which God forbid, this will be the euthanasia of the republic. While the extent of our territory exempts us from the extinction of our liberties by popular violence, it increases the only other catastrophe to which we can be exposed—the concentration of power in the executive.

These general views of the fascinating allurements of power and patronage, and their corruptive influence when brought to bear upon small and permanent bodies of men, are specifically illustrated by the experience of all those nations that have made the experiment of an elective monarchy. In those countries we have seen the pure current of public virtue sink into the sluggish stream of venality, and the institutions of freedom decay and perish under its corroding influence. No people on earth were more distinguished for their stern and hardy virtues, than the Romans, in the days of Fabricius; none more for their open and shameless

corruption, than the same people, in the days of Julian. In the very same city, where the first Brutus swore, by the reeking blood of the violated Lucretia, to exterminate every vestige of monarchy from Rome, we have seen an infamous band of pretorian soldiers proclaim from the ramparts, that the imperial sceptre was for sale at public auction! How striking the contrast; how impressive the lesson it teaches us; and how inexcusable should we be to neglect its admonitions.

The history of Poland furnishes another example replete with instruction, directly pertinent to the subject of our investigation. By the constitution of that country, at one period, the election of the chief executive magistrate devolved upon the diet, a legislative assembly even more numerous than this House. Yet, what was the result? A scene of habitual and prostitute corruption, scarcely preceded in the annals of human depravity. No attempt was made even to disguise the enormity of the transaction; but the royal competitors entered the market, and conducted their infamous traffic for the crown, in the face of the whole world, with as much indifference to its opinion, as a citizen here exhibits in going to the shambles to buy the beef for his dinner.

But, sir, on this subject of the danger of executive patronage, when brought in contact with the legislative body, there is no country of which the example comes so nearly home to us as England. We can scarcely hope to be exempted from those national frailties, which shall appear from their political history, to be inherent in the character of the English. We are their descendants, and I am proud to acknowledge it. As we cannot claim either gods, or Greeks, or Romans, for our ancestors, I rejoice that we have an English ancestry. The Anglo-Saxon, for sturdy and masculine national virtues, is unquestionably the best stock of modern times. To the example, then, of that hardy race, who, in the twilight of civilization, extorted *magna charta* from an unwilling monarch, and, at



a subsequent period, prescribed the limits of royal power by a bill of rights, I confidently appeal to demonstrate the insinuating and irresistible power of executive patronage, upon political bodies like this.

During the reign of the Stuarts, the contest between liberty and power, was maintained under the names of royal prerogative and parliamentary privilege. In this contest, liberty was triumphant. Power, undisguised, was under the necessity of yielding to its more sturdy antagonist. But the revolution brought a new family to the throne, made wiser, but not better, by the catastrophe of that which had immediately preceded it. The family of Orange gave up the claim of prerogative, and substituted what is speciously denominated influence, which is but another word for corruption. Sir, I lament the fact, while I declare it; but it cannot be disguised that the English parliament is notoriously under the influence, the corrupt influence, of executive patronage. Power, by the skilful use of this alluring blandishment, has risen from its fall, and re-established its dominion. Since the celebrated resolutions of Mr. Dunning, declaring that the power of 'the crown had increased, was increasing, and ought to be diminished,' no successful effort has ever been made in parliament to reform abuses or to resist the influence of the crown. Patronage has shed its moral pestilence over the political system; and almost every page of English history records the melancholy frailty of public men, in the fall of some parliamentary champion of the rights of the people, the victim of royal influence.

Sir Robert Walpole, one of the most able ministers that English history can boast, and too fatally versed in the corrupt use of executive patronage, expressed as his deliberate opinion, founded upon his long ministerial experience, that, with the exception of three men, 'every politician he had ever known had his price.' Though certainly not universally true, this remark, is but too generally so in reference to all ages and countries. There is a precise accuracy in the phraseology

of this sentiment, indicative of the masterly skill of him who expressed it. "Every man has his price." That is to say, you must study the character and foibles of each man, to ascertain what it is that will make him subservient to your purpose. A man who would reject a pecuniary bribe with indignation, would, perhaps, have no scruples to hold a negotiation for an office. Another who would disdain to make an express stipulation even for an office, might think it quite excusable to act under an implied understanding. And a third who could not reconcile it to his conscience, to have any understanding, either express or implied, might be seduced by accidentally hearing that a certain office was designed for him as a reward, not for his vote, but for his extraordinary merits. There is no end, sir, to the subterfuges of that self-deluding casuistry, by which ambition is prone to silence the remonstrances of conscience.

There is a marked distinction between public and private corruption, that explains the reason why the one is so much more generally successful than the other, in conquering those who fall within the sphere of its influence. There is a dazzling splendor in successful ambition, that conceals the depravity by which it achieves its purpose. The man who steals a pen-knife is shunned as an object of abhorrence; the man who steals a sceptre is hailed as an object of adoration. Power diffuses a deceptive gloss over the crimes of the usurper, and corruption sheds indemnity over its victims. Such are the fascinations of power, that it often wins the homage even of those whose dearest rights it has violated. But, sir, I can never regard it in any other light than as a public crime of the most atrocious hue, to acquire power by fraud and corruption. The man who rises by such means, is a felon, *flagrante delicto*, and the insignia of his office are the standing monuments of his guilt.

But, sir, it is often said—"true, the politicians of England have been corrupted by patronage, but those of the United States are of more inflexible materials."

Indeed ! Where did we obtain this charter of exemption from human frailty ? Alas, sir, we have no such exemption. The people of the United States, for the reasons which I have explained, are superior, both in virtue and intelligence, to those of any age or country ; but their statesmen are subject to the same influences that operate upon those of England, not, perhaps, in the same degree, but in a degree that is destined to be constantly increased, if not resisted by measures similar to the present. Sir, there is no country on earth where office has greater attractions, or is sought with more avidity, than in the United States. Since I have been in public life, it has been a constant source of mortification to me to witness the spirit which prevails on this subject. There are those, it seems to me, who would rather eat the “ very crumbs from the trenchers ” of executive patronage, than the bread of honest independence.

In one respect, it appears to me, we cannot stand a comparison with the statesmen of England. We do not estimate the dignity of a seat on this floor as highly as an Englishman estimates a seat in parliament. To those whose objects are the public service, and an honest fame, there can be no theatre so desirable as this floor. But what mortifying spectacles have we seen, of eager competition among members of Congress, for the most pitiful and contemptible offices in the gift of the executive, merely for the pecuniary emolument ! Offices which I do not believe a member of the English parliament would accept at the hand of his sovereign. Nor do I see among us any of that extraordinary inflexibility in the adherence to political principles, of which the history of England furnishes some honorable examples. The elder Pitt threw his commission in the face of his sovereign, as soon as he found that his own political principles could not prevail in the cabinet. But, do we find any instances among us of the sacrifice of power to principle ? On the contrary, do we not find political principle, and consistency, openly sacrificed at the



shrine of power? We see politicians of every hue and description thrown together, in the most incongruous combination, exhibiting all the colors of the rainbow, without either its beauty or proportions; a sort of crazy patch-work, held together by no community either of principle or feeling, that throws into the shade Burke's celebrated description of a motley cabinet in England. Sir, it is melancholy to witness what we cannot disguise from ourselves, that a fondness for the nominal dignity and ostentatious display of office—the mere exterior trappings of honor without the substance, should be more regarded than the solid consolations of a fame, which can only be acquired by a consistent course of public service. This seems to me to be one of our peculiar weaknesses. It is rapidly growing upon us. Never was there, in any country, such rapid advances in luxury and refinement, with all their associated frailties. Hitherto, the venerable fathers of the revolution have presided over us. Their stern and incorruptible virtues, tried and strengthened in the crucible of a long conflict for liberty, were a sufficient guarantee against the use of corruption. But the sceptre has passed into the hands of a new generation, and I fear the mantle of revolutionary purity has not descended with it. We have certainly seen the purest days of the republic. The sterling virtues of the revolution are silently passing away, and the period is not distant when there will be no living monument to remind us of those glorious days of trial. If their virtues do not survive, may their memory at least be long cherished! Let it not be supposed, then, from the example of the past, that there is no danger of corruption.

But we are often told that this government has not sufficient patronage to produce corruption; and I have even heard the opinion expressed, that there was not enough to hold the government together. Hold the the government together! Heaven preserve the purity of that government that is to be held together by patronage! But it is a great mistake to estimate the

patronage of this government so lightly. It is even now great, and it is rapidly increasing. We are not the mere beings of a day, but must look forward at least to a few generations of our posterity. What, sir, is the prospect? I am almost afraid to contemplate the spectacle of our growth. In little more than half a century from this day—a period which many, I trust, of those who hear me will live to witness, the population of these United States will have swelled to the mighty number of forty millions of human souls! With twice the present population of England, and the vast multiplication of offices resulting from the increasing wants and growing interests of that population, what must be the extent of executive patronage, and what the virtue of our successors here to encounter, and yet resist it? We are admonished by the experience of nations, that if we would resist corruption effectually, it must be done in the incipient stages of degeneracy. No nation ever has been seen to retrace her steps after having fairly and fully commenced the downward march. The tide of corruption never flows backwards. If once the fatal poison is infused into a vital part of the system, nothing is left to us but to await the issue with melancholy resignation.

I now beg leave, Mr. Chairman, to invite the attention of the committee to the consideration of the objections, founded upon the destruction of the contingent equality of the small states in the House of Representatives.

And, in the first place, I would remark, that the proposed amendment will do little more than bring back the constitution, in this respect, to what it was before the amendment, made in consequence of certain incidents, in the election of Mr. Jefferson. As the constitution stood, before that amendment, the contingency of the presidential election devolving upon this House, was nearly as remote as it will be, if the proposed amendment should be adopted.

It will be recollected, that, as the constitution originally stood, each elector voted for two persons as



President, without discrimination. In consequence of this, the chance of an election by the primary vote of the electors, was twice as great as it is now, under the existing provisions of the constitution.

In looking at the principles of compromise, upon which the constitution was founded, as the basis of an argument touching the relative powers of the different members of the confederacy, it is unquestionably proper that we should recur to those principles, as they were arranged by the federal convention. It would not be exhibiting a becoming spirit, for the small states to insist upon making that a common occurrence, which the framers of the constitution evidently regarded as a contingent and unavoidable evil; more especially, as that contingent evil has been rendered almost certain by an amendment, from which any such effect was neither intended nor anticipated. There is no man more disposed to preserve the essential rights of the small states than I am: for I represent a state that belongs to that denomination. But are the small states in any danger? Is it not obvious, from the whole structure of the constitution, that they are the favorite children of the constitution? What, sir, is the relative power of that state, so ably represented by the Chairman of this committee? Has she any cause of complaint, on that score, even in the primary vote for President? With a population not more numerous than the constituents of a single one of the thirty-four members from New York, she has three electoral votes, while the same number of citizens in New York have little more than a single vote.

The true security of the small states consists in their perfect equality in the senate, a co-ordinate branch of the legislature, and in the abolition of all those invidious distinctions, that could lead to their oppression. Sir, the smallest state in this union, when threatened with danger, has a right to invoke—and the invocation, I am sure, would never be made in vain—the whole power of the union for its defence and



preservation. It is in vain for them to think of entering into a competition of power.

And here, sir, I invite the attention of the gentlemen representing small states to an argument, founded on the true interests of the small states. I maintain that, on the score of policy merely, the small states ought to be most anxious to surrender this contingent equality, on the terms proposed in the amendment. What will be the consequence, if they refuse? Will the people of the United States, having the power of preventing it, patiently submit to be governed by a small minority? Will New York and Pennsylvania, and Virginia, submit to the occurrence of a contingency, that will reduce them to a level with Delaware, Illinois and Missouri? Rest assured, sir, the large states will form preliminary combinations to prevent the election from devolving upon the House of Representatives.

With such perfect abhorrence do I look upon the interference of this House, in the election of the President, that if the small states pertinaciously adhere to the present system, and prevent the amendment of the constitution in time for the next election, I will myself, should no other person do it, propose a convention of popular delegates from the whole union, to nominate a President; and I would stand pledged to sustain the nomination. If you will not amend the constitution, the people will rise above it. It is idle to think of preventing the people of this country from exercising the most legitimate and important of their sovereign rights, by paper restrictions. You had as well, sir, attempt to tie down a lion with a cobweb. Where, then, will be the small states, and what the value of a contingent equality, when the contingency will never occur? As a friend to the just rights of the small states, I beseech gentlemen not to persevere in the attempt to retain an unjust power, at the hazard of these combinations among the large states, that will inevitably result in the oppression of their more feeble competitors.

But have the people of the small states any interest

in the possession of this contested equality of power? Though it may increase the power of their politicians, and enable them to secure a large dividend of executive patronage, yet what do the people gain either in power or happiness? Has a small state—merely as a small state—any right or interest, which would be safer in the hands of a President chosen by Congress, than they would be in the hands of a President chosen by the people?

But, sir, is not this a delusive mockery even as to the question of power? Do states really exercise it in point of fact? Consulting the actual operations of the system, we find that the representatives of the small states have as often voted against the will of those states, as in conformity with it. Will the small states contend, then, for the worse than unprofitable right, of being misrepresented on the great subject of the presidential election? Will they persist in a system that serves only to expose their representatives to extraordinary temptation, throwing them into a scene of action, in which, if they had the virtue of Cato, they could not avoid suspicion? But the strong argument in favor of the proposed amendment, in reference to this question of relative power, is the equitable compromise which it involves between the large and the small states. It is that very spirit of mutual concession in which our government originated. By the district system, the large states give up the power of forming combinations to overpower the small: and by removing the eventual election from this House, the small states give up their contingent equality. What most forcibly recommends this compromise, is the consideration, that the powers mutually surrendered by the large and the small states, are dangerous to the purity of the republic. It is an offering which patriotism requires us to make at the shrine of liberty. Is it possible that we can hesitate?

I do sincerely believe, that we have reached a crisis in our great political experiment, when the fate of that experiment will depend upon the wisdom with

which we act. Never was there a human assembly invoked by higher considerations, to act with disinterested magnanimity. The destiny, not only of the rising millions that are to come after us here, but that of the whole civilized world, hangs trembling on the issue of our deliberations. No nation on earth has ever exerted so extensive an influence on human affairs, as this will certainly exercise, if we preserve our glorious system of government in its purity. The liberty of this country is a sacred depository—a vestal fire, which Providence has committed to us for the general benefit of mankind. It is the world's last hope. Extinguish it, and the earth will be covered with eternal darkness. “But once put out that light, I know not where is that Promethean heat, that can that light relumine.”

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# SPEECH OF HENRY R. STORRS,

DELIVERED

IN THE HOUSE OF REPRESENTATIVES OF THE UNITED  
STATES, FEBRUARY 17, 1826,

On the following resolutions, “ *Resolved*, That, for the purpose of electing the President and Vice President of the United States, the constitution ought to be so amended, that a uniform system of voting by districts, shall be established in all the states ; and that the constitution ought to be further amended, in such manner as will prevent the election of the aforesaid officers from devolving upon the respective Houses of Congress.

“ *Resolved*, That a select committee be appointed, with instructions to prepare and report a joint resolution, embracing the aforesaid objects.”



MR. CHAIRMAN,

THE propositions to amend the constitution, now before us, which have been submitted by the honorable gentleman from South Carolina, (Mr. M'Duffie,) are not altogether new to our deliberations. So much of them as proposes to change the present mode of electing the President and Vice President, by establishing within the several states a uniform system of voting by districts, was introduced into this House at the last session of the sixteenth Congress and finally rejected. The other branch of the amendment, which takes the second election from Congress, is now for the first time, at least since I have had the honor of a seat here, presented for examination.

It becomes us, sir, in my humble opinion, to approach this subject with the profoundest reverence for this constitution, as the work of that illustrious body of patriots and statesmen, who seem to have been raised up by Providence, at that peculiarly eventful period, to guide by their eminent wisdom and exalted public virtue, the councils of that convention, the result of

whose deliberations was to fix the future destinies of this great empire of freedom. They were men originally highly gifted by nature and deeply versed in political knowledge; they had been educated in the principles of civil liberty, and well understood the temper and genius of their country, its interests and the spirit of its institutions. They justly considered that the government, which was then to be framed, was to be adapted to an educated and enlightened country, and to be sustained by moral sentiment and the political virtue and justice of the people. The lights of experience and history, which these men followed, were neither "few, faint, or glimmering" in their eyes; and I might, perhaps, with rather more justice than was shown by the honorable gentleman from South Carolina, reverse the opinion which he pronounced on their comparative merits, and say, that the most ordinary member of that convention knew more of the true principles of the constitution than the whole common mass of politicians in our day. The well known encomium recorded in history, which the virtues of this class of men elicited, during the revolution, from a British senate, was no less just and candid than honorable to them, as the testimony of the first statesman of that age and country. They were men who made no extraordinary or officious pretensions to patriotism, but are best known to our generation by their works and the blessings which this great and prosperous nation now enjoys. For sound views of the theory of government, just application of political principles and as the purest models of eloquence, the public papers of the statesmen of our revolution have never been excelled and will long remain unrivalled.

The times, too, were auspicious to the work before them. The pressure of public calamity had purified the souls of men; the common dangers of the revolution had bound the country together as brethren of one family; its sufferings had taught them the value of liberty, the necessity of union, and mutual forbearance with each other, and the preciousness of the in-

heritance which was to descend to us, their children. No selfish passions or unhallowed purposes of ambition tainted the hearts of those who were called to that convention by their countrymen. The wisdom and the works of such men are not to be handled with temerity, and I may surely be permitted to speak for myself, as one of many yet scarcely in the seventh year of an apprenticeship here, when I say, that instead of flattering ourselves that we have become wiser than they, we should rather distrust our own political knowledge, as well as our ability to add any substantial or valuable improvement to a system of government, which came from the hands of men who seem to have been moved by the influence of inspiration itself. I trust that, on an occasion so serious as this, we shall lay aside all prejudices and feeling, and remember that, when we tread this sacred path, we move on holy ground.

It would have been more satisfactory and we might have formed a better opinion of the operation of the plan which the honorable mover of this amendment intends finally to introduce, had he furnished us at once with all the details of his system. The naked propositions, which alone are involved in the resolutions as they now stand, might then have been entitled, perhaps, to more comparative merit than can be allowed to them as merely insulated principles. They may deserve more or less favor in our judgments, as they may or may not be connected with distributions of the electoral power, which shall preserve more or less of the original political system of the constitution. As the honorable gentleman has not favored us with any particular details, we must consider these propositions chiefly on the intrinsic merits which they deserve as operating to expunge these particular features of the constitution; and in this view of their expediency, they propose an entire and radical change of the principles on which the whole structure of the political system of the general government is founded. The most difficult question, which presented itself for adjustment to the fede-



ral convention, was this distribution of the electoral power in the choice of the executive. The peculiar difficulties, which pressed the convention on this delicate point, were at last overcome and it was finally arranged on principles much more satisfactory than the best friends of the constitution, at one time, supposed the form of the confederacy would admit of among them, consistently with the separate sovereignty of the states and the preservation of the just relative influence and interests of each. This part of the plan of the federal government was received in the state conventions with less objection than almost any other. The state conventions well understood the basis and principles of union on which the government rested, and in all the discussions which the constitution produced in these conventions, it was scarcely denied or questioned by any, that in this particular the plan was the wisest and best which the convention could have devised to secure the objects of the union. It can hardly be inferred that those conventions could have mistaken their own views, or that the future operations of this part of the system were not clearly foreseen and well understood.

The structure of this part of the constitution has also been revised and amended under the administration and influence of many of those who first put the government into operation. It is well worth our notice, too, that this revision and amendment took place at a period immediately succeeding the contingency which devolved the election of a President on the House of Representatives, and when the evils of an election by that body, whatever they may have been, were directly in the view of those who proposed that amendment. It was also a time when the prevailing doctrines were peculiarly auspicious to the success of any fancied improvement which should infuse into the system a larger portion of popular power in the presidential election, if such an object was more consonant to its original principles. The professed object of the Congress of 1802, was also not so much

to change the distribution of the elective power, as to give that true constitutional impulse to the system, which was alleged to have departed, in its practical operation, from its primary intention of carrying into effect the will of the majority of the people. Whether this has, in fact, been the only result of the amendment then adopted, it is not material to this part of the discussion to inquire. If, however, it has led to consequences which were not then foreseen, or if feared, not effectually guarded against, we may now be admonished of the dangers which commonly follow every disturbance of the fundamental principles of any settled form of government, however speciously amendments may be maintained, or however highly we may estimate our own foresight. The principles on which the political revolution of 1801 was founded, would also have tended powerfully to promote the result which the amendment, now offered to the House, assumes to be so desirable. Those who then came into power out of the political struggles during the previous administration, rested much of their claims to public confidence on their support of the rights of the people. During the administration of Mr. Jefferson, this confidence secured the political power of the republican party; and yet, Mr. Chairman, during the whole period of that administration, this amendment of the constitution, which is now pressed upon us as so clearly indispensable and vital to the system, escaped the attention of the keen-sighted politicians of those days, or if considered at all, was never presented to the people as an amendment called for by the principles on which their power was established. The dangers of an election by the House of Representatives were then fairly and directly before the Congress and the country; and if it is now so palpable that such an election contains within itself the alarming innate constitutional principles of corruption, of which we have heard so much from the honorable gentleman from South Carolina, it must be somewhat unaccountable, and we must reflect upon it with wonder, that the sagacity of the

statesmen of Mr. Jefferson's administration had not detected and reformed this vicious inclination of the system.

Whatever may prove, in the final vote of the House, to be the result of this discussion, it is, perhaps, not to be regretted, that the propositions, now before the committee, have been moved. The subject has certainly excited some interest in many of the states, and our deliberations here may, perhaps, tend to develop the real effect to be produced by the amendment, and place its expediency, in public opinion, on its true merits, whatever they may be. In the course of the remarks of the honorable gentleman from South Carolina, he was pleased to derive many of his illustrations from the past course of political events in the state which I have the honor, in part, to represent; and I am not disposed to deny that such has been, sometimes, the effect of her domestic dissensions on her true interests and prosperity at home, and her just influence in the union, that many useful lessons may be derived from her experience. The evils which have afflicted that state may chiefly be traced to an arrangement of the power of appointment in her original constitution, unsuited to the times which followed its adoption, and the great extent of state patronage which has been the necessary consequence of her increase in population and wealth, and the great variety of those political institutions which have resulted from her prosperity. Ferocious systems of politics, demoralizing institutions of party, and intolerant proscriptions of virtuous and honorable men, have sometimes stained her annals and destroyed her moral power. But, sir, the people there have laid their own reforming hand on their political institutions. Their present constitution has dispersed the distribution of that enormous accumulation of patronage, which tended to pollute the administration of her government—the old spirit of party now merely lingers for awhile around a miserable remnant of its former idolatry, and public men must there be now brought to the standard of



unbiassed public opinion, and tested by their political virtue.

The honorable gentleman has referred us to a recent event, as an expression of the true sense of the people of that state, in favor of a part of the amendment embraced in his resolutions. I shall, certainly, at all times feel the highest respect for the opinions of that people, and especially on a mere question of expediency. But, in looking to the late vote of that state, in favor of a district system in the presidential election, I do not find in it that satisfactory evidence of their wishes, which I should desire to have on every question affecting their state interests, before I yield up my own opinion. The census, taken nearly a year ago, shows that the state then contained nearly two hundred and seventy-six thousand qualified voters, and I believe that their number is rather underrated, when I estimate, that at the last November election three hundred thousand electors were entitled to vote on that question. Now, sir, the returns of the vote show, that on that proposition, about two thirds of the electors of that state expressed no opinion whatever. The whole number of persons who voted both for a general ticket and district system, was only about one third of the state; and, of this number, only a majority of some six or eight thousand preferred the district system, and the whole vote in favor of the district system was but a comparatively small part, about sixty or seventy thousand, out of nearly three hundred thousand electors.

Though, as a general rule, I should not offer here or elsewhere, any other criterion by which we should judge of public sentiment, than the sense of the people expressed in its proper constitutional forms, yet when, on this peculiar subject and occasion, I am referred to such a vote of my own state as evidence of the actual wish of that people, I must be permitted to doubt if there is justly to be derived from it any fair or satisfactory conclusion of the state of public opinion on this matter. This vote is susceptible, too, of other explanations, which authorize us to make a very large deduc-

tion from the value of the illustration which was drawn from it by the honorable gentleman from South Carolina. The time and circumstances under which this question was presented to the people of that state, were peculiarly unfavorable for eliciting a full and fair expression of public sentiment upon the expediency of the proposition. The course of political events in the state, for some years past, is well known here. In the renovation of her constitution, they had been lately thrice called to the polls of the election. Scarcely had the agitation of that reformation of her system and the subsequent elections of her state and local officers subsided, and every thing seemed to promise her a long respite, if not lasting repose, from her severe and bitter trials, when an insane legislature, under the influence of infatuated and desperate party councils, shamelessly bid defiance to the known public will and dared to try their strength against the mighty indignation of an insulted people. They found themselves again called to a new and unexpected contest with corrupt and lawless authority and when the anxious crisis of their moral power arrived, they rose in the strength of freemen, and, breaking the feeble chains of party, overwhelmed the usurpers of their rights in one common and undistinguishable destruction. When, sir, history, faithful to the day in which we live, shall record her annals, the long train of ruins which followed that tempest of popular indignation, shall mark out her path to future times. Having successfully wrested from the legislature this right so long and unjustly withheld, the people of that state, exhausted in these repeated political conflicts, relapsed from the high excitement of that interesting period and reposed in too confident security. It was in this state of comparative apathy that a specious and insidious proposition to district that state was presented to them. In this repose, they have been shorn of their strength in the election of the President, and suspicions have prevailed, not founded on slight observation of past events, or imperfect judgment of the fu-



ture, that the tendency of this suicidal policy may chiefly be to paralyze her state power and influence, and enable party leaders to bring into market a large share of her electoral votes, who would otherwise despair of success on a general ticket throughout the state.

Before I proceed to the particular merits of the amendments now before us, I will ask the attention of the committee to an examination of some parts of the political structure of the constitution and the principles on which the elective power, in the choice of the President, was organized. In reforming this system of government, it is necessary that we should first form for ourselves just views of what these principles really are. It will not answer, on so grave a subject, to assume that they were, or ought to be what we may merely desire them to have been; and then deduce from any hypothesis of our own merely, the expediency of improvements which we propose to engraft upon the system and their consistency with the original principles of the constitution itself. The honorable gentleman from South Carolina, assumed as first principles throughout the whole course of his remarks, that the original adjustment of the electoral power was intended to obtain the sense of a majority of the people of the United States, in the election of the President; and he reasons throughout on the assumption that in this adjustment we find the introduction of the democratic representative principle into the system—that the plan of a district system, which his amendment proposes, is most congenial to the spirit and intention of the constitution in the operation of the elective power and that the general ticket system tends to subvert and defeat the fair expression of the will of a majority of the people in the election. If these positions (and I have endeavored to state them with precision and fairness.) are not sustained by the constitution, the foundation on which this part of the amendment and the argument for its adoption rests, are unsound in principle—they carry with them no recom-



mendations to our favor or support, and every conclusion which has been drawn from the various views in which the operation of this part of the amendment has been presented to us, must be essentially vicious.

I concur in the opinion expressed by the honorable gentleman, that the exercise of the power of choosing the presidential electors by the state legislatures, is neither warranted by any fair construction of the constitution nor the spirit of the system. My opinion, however, of the unconstitutionality of that assumption of power is founded on views of the principles of the constitution, essentially different from those on which his amendment is founded. I shall have occasion to notice this point in another part of my remarks, and will not stop to examine it here.

The first inquiry, then, directly before us, and which must be answered before we can proceed to any illustration of the true character and effect of this amendment, is—what are the true constitutional principles on which this elective power was adjusted? I dissent entirely, Mr. Chairman, from every fundamental position which the honorable gentleman has assumed, and hope to be able to convince this committee that the amendment cannot be sustained on any principles which can be found in this constitution.

The great end to be accomplished in the formation of the constitution, was the establishment of a national government which should be adequate to the objects, in which, as one people, we had common interests and which, at the same time, should preserve in the adjustment of the principles of the system, the just influence and power of the several states of the confederacy. The parties to this compact came together in the character of separate and independent sovereignties. They were distinct sovereign communities of people, but in all that related to their external relations and their common security, as well as in much that concerned their domestic and internal prosperity, their true and obvious policy was the same. The formation of a common government for any of

these purposes, however, was attended with great moral and practical difficulties. The natural situation and advantages of some of the states, and the character and habits of the people had led them to look to commerce and navigation, as one of the chief sources of their future prosperity. Other causes, combined with some of these, had in some degree, established a different policy in other states, more suited to the existing state of their particular interests and social institutions, and perhaps more compatible with their safety. They differed greatly from each other in relative power and population, and it was foreseen that many causes arising from the peculiar advantages, (and especially from the crown lands within their territorial limits,) which some of them possessed, would necessarily increase this disparity in future. In several of the states there existed common political interests peculiar in their character, and closely connected with their internal peace and security—perhaps their very existence—which these states could never safely subject, in any degree, to the operation of any system not under their own direct and exclusive control. Public opinion, arising in a considerable degree from difference of situation and interests, education and particular habits of thinking, had established in many of the states different notions upon many of the principles which enter into the distribution of political power in representative government; and, although in the great original outlines of that system the constitutions of the state governments were organized on the same general principles, yet we were not in this as well as in other respects, altogether a homogeneous people. It was a most difficult and delicate matter, calling for all the sagacity, prudence and forbearance as well as political wisdom of the ablest and purest men, to reconcile in any way, and to unite even for the most clearly desirable ends, under one frame of government, the various and distinct, if not in some respects incongruous and repugnant interests of the parties to the federal constitution. If the secret history of the

convention shall ever, as it probably will, be fully disclosed, we may, perhaps, find that at one time its actual dissolution was considered as hardly problematical.

By the then existing systems of government, the security of all these various interests of the several states was confided under their own constitutional forms of government to legislatures immediately responsible to them alone. It was to these bodies that the protection of their civil rights was directly entrusted. The power and resources of the states were in the hands of these legislatures as the immediate guardians of the common political interests of the people who created them. In the formation of a compact between the people of the respective states, which should create a more extended and combined national government and confederated republic, they were called upon to take from their state legislatures many of the powers of sovereignty which had been vested in them, and to confer those powers on the federal government. In the distribution not only of those powers, but in all those which should be incidentally accessory to the new system, they were most sensibly alive to the security of their separate interests and the preservation of their just relative political influence in that peculiar system which was to be established more or less on the basis of the popular principle of a representation of the people of the several states, as different sovereign communities. In the adjustment of the executive power of the union in all its branches, the convention were met with the full pressure of these various influences. It was natural that the people of a country on which the hand of tyranny had so recently inflicted the most frightful calamities of despotic vengeance, should look to the organization of the elective and executive power with the keenest suspicion and most watchful jealousy. The example of other countries, too, was before them. It was this power which in all governments was most disposed to strengthen itself, and which, in this, might find its policy in weakening those



interests and influences to be here secured by the constitution to the people of the several states and which might obstruct its path. Experience may, indeed, have shown in the operation of the government, that those fears which were entertained when this constitution was presented to the people for their adoption, were more or less unfounded, and that the executive power is, in truth, much weaker than it was theoretically supposed to be. Be that as it may, we are seeking, in this discussion, to ascertain the true principles on which this power was intended to be adjusted by the framers of the constitution and the people of the several states who adopted it. It is then, sir, in my opinion, a compact between the people of the several states with each other of the respective states, as distinct, sovereign, political and primary communities. It is not to be treated as the creature of the state legislatures. These were not parties, as legislatures, in any sense, to this compact. The constitution throughout speaks of the parties to the compact in the character of such distinct state communities. It was to be ratified by the conventions of "the states." The House of Representatives is composed of members chosen by "the people" of the "several states." Representation and direct taxes were to be apportioned among the several "states." Each "state" shall have at least one representative. The senate shall be composed of two senators from "each state," chosen by the "legislature thereof." In the choice of a President by the House of Representatives, the votes shall be taken by "states"—the "representation from each state having one vote." The judicial power shall reach all cases between two or more "states," &c. and between "a state," or the citizens "thereof," and "foreign states." The sense in which this term is so obviously used throughout the constitution, is founded on the principle which I have before stated, and there is not, in my judgment, a single instance in which it has been used in that instrument, which does not fairly admit of that construction which is so much in har-

mony with the moral and political considerations which entered into the structure of the government. It is true that the legislative power operates equally on the people of the several states, and their political rights and duties are common; and, so far as the government, incidentally from its structure and more directly in the system of general legislation conferred on Congress in certain enumerated powers, produces that equality, it must be considered as a national or municipal system and as emanating from the people of the United States as one common mass—and it seems to me that, in this point, the supporters of state rights have commonly mistaken the just foundation of their principles, and endeavored to derive, from mere rules applicable to the construction of these grants of power, the great principles of security to the rights reserved to the states in this system of government and its operation. This reservation and these securities lie, in my opinion, in very different parts of the system and in none are they more vitally concerned than in the distribution of the electoral power which we are now considering. It is a great error to treat this system as founded on the pure, popular, representative principle, (which the amendment professes to adopt,) in the structure of any branch of the government. The senate is established on no such basis. The composition of the representation of the states in this House is governed by no such rule. There is one interest which goes to make up the relative numerical power of some of the states here, which directly subverts the whole foundation of popular representation in a free government, and the smaller states are secured one representative at least, on principles which have no necessary connexion with the population of those states. The distribution of the electoral power in the choice of the President by the several states, has been graduated among them by their collective numerical power in this House and the senate, which carries in it the ingredient of all the federative as well as representative principles which entered into this political



system. The compromise, which produced this constitution, is illustrated by these views of the subject. The representation in the senate secured the equal power of the state sovereignties, (not their legislatures,) in Congress; and in other respects, these sovereignties there hold the exercise of the executive power, in some degree, under their own control. The slave-holding states retained in their representation in this House an adequate security for that interest, and the compensation, whatever may have since proved to be its value, which the free states received for that concession is also to be found in the same instrument. The deductions, which I draw from these first principles of the constitution, are, that in the election of President, the expression of the will of the people of the several states, as distinct political communities, was intended to be preserved inviolably in that election.

The primary object of the exercise of that elective power was not to collect the sense of the people of the United States as one common mass, but as representing the will of separate independent republics. They, as the people of the several states, were the parties to the compact and not the state legislatures. A construction different from this is not in harmony with the nature and analogies of the constitution, and goes to expunge the expression of the public sentiment of the people, as states, totally from the election. The exclusion of the power of the state legislatures from the choice of the President, must be the necessary political consequence of this view of the system, unless we admit that it may have been the design of the framers of the constitution to give it an effect which might render the President the mere creature of the state legislatures, in known hostility to the popular will of the states. It is not an answer to say, that the state legislatures represent the will of the state sovereignties. They do so on all the points of power conferred upon them by the people of the states; but this right of choosing the electors for President is derived from the constitution of the general govern-



ment, and conferred on and fixed in the people themselves. That part of the constitution which treats of the choice of electors, is, in my opinion, perfectly reconcileable with the principles which I have advanced, and cannot fairly receive any other interpretation. The spirit of the compact and structure of the system conform to such an exposition of the terms. It is said, that "each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress." If, by the word state, is here meant, as in other parts of the constitution, the different communities of people which constitute these bodies politic—and the constitution did not intend a departure, in this particular instance, from that sense—the interpretation of this clause is clear, and especially more so, if the popular will was at all times to be preserved as a constituent ingredient in the presidential election. The absurdity of the consequences, to which a contrary construction would lead, is a strong argument to show that this power was never to be left to the state legislatures. The constitution has prescribed, that representatives shall be chosen by the persons entitled to vote for the most numerous branch of the state legislatures; but has not directly fixed the qualifications of voters for the presidential election. Under the notion of a broad discretion vested in the state legislatures, those bodies might devolve the choice of the electors on a different class of citizens, and of other qualifications. Nay, sir, there can be nothing to prevent them from vesting that power, if they have it, in a board of bank directors, a turnpike corporation, or a synagogue. The consequences which have flowed from this assumption of power by the state legislatures, and its effect at times on the result of the presidential election, to say nothing of its frequent abuse, have been well stated by the honorable gentleman from South Carolina. I am not disposed to differ with him in opinion on the course of the legislature of my own

state in this matter. New York has not, however, been the only state in which this power has been assumed by the legislature. In the state of South Carolina, the people have not exercised this right, and the direct expression of the popular will of that state, in the election, has not been heard since the adoption of the constitution. I hope, that, when the people of that state come to its full enjoyment, they will not be compelled to receive, as it came to the people of New York, in the humiliating form of a favor that constitutional franchise which South Carolina has been so long entitled to demand as a right.

But, sir, to return from this digression; the jealousy, which the people of these states felt on this point, appears more clearly when we consider this elective right as a state power in connexion with other somewhat analogous parts of the constitution. The scrupulous care with which they secured the exercise of this power from the interference of Congress, is worth our notice here. The constitution has provided that the "times and manner" of the elections for senators and representatives prescribed by the state legislatures, may be altered by Congress; but the choice of the presidential electors is taken completely beyond the reach of any interference by the other states, and all power over that subject is entirely withheld from the Congress. In the transfer of the election to the House of Representatives, on the occurrence of the contingency which devolves the election on that body, though the numerical power of the large states has been surrendered, and the small states, in that event, receive their equivalent for the loss of their equality in the primary election, yet the same federative principle is preserved in the ballot. "The representation from each state shall have one vote." If, sir, we examine this constitution and reflect on the symmetry and harmony of its structure, and the complex and seemingly irreconcilable principles on which the political interests of the states were to be united and preserved in the federative system, and consider only to what de-



gree the prosperity and happiness of this nation have already advanced under its auspicious influence, we are struck with wonder and admiration that it is the work of human wisdom only.

The right of choosing electors in their own way, being thus retained by the states by the original compact of the constitution, is to be exercised as they only shall deem best for the preservation of their just political importance in the union. When the large states consent to surrender it, or suffer themselves to be broken up into fragments under the district system of an amendment, which proposes to melt down, into one common mass, the people of the several states, they have destroyed their strength, and will, at last, find their real interests sacrificed by the operation of this distracting policy. Every step which is taken towards this system, approximates to a consolidation, which must finally annihilate their influence in the confederacy. The amendment of the honorable gentleman from South Carolina, strikes at the vitality of their political power, and prostrates them at a single blow. Fasten this fatal system upon them by constitutional authority, and the measure can never be retraced. If in the progress of the government, peculiar natural advantages, the enterprise of the people, or any causes whatever have changed the relative power of the free states in the presidential election, it is not only what was foreseen at the adoption of the constitution as probable, but they gave in the compact a fair equivalent, and what was then received as satisfactory if not all which was asked. But it is not the free states alone which are concerned in the consequences which must result from this dismemberment of the power of the states. It is a surrender of the sovereignty of all; and every innovation of principle which disturbs the original adjustment of the power of the states and gives the system an impulse towards an unmixed democracy, secretly undermines their security. The relative ratio of increase in population among the states, has steadily, from the first adoption of the constitution,



advanced in one direction. Every successive census and apportionment of representation here, indicates an approach to that point which may give to the free states two-thirds of the numerical political strength of this House. The state sovereignties now hold this power in check, but every movement which disturbs their stability in this system, weakens the foundations of the government. The state which I have the honor partly to represent, has as deep a stake in the preservation of this government as the smallest state in the union. I trust that she will forever feel how closely she is allied to them all in the common interests, the prosperity and the common glory of the nation.

But, sir, if this compact between these states is now to be reformed on a different basis from that on which it was originally established, and it were even desirable to place the elective power in the choice of the President only, (without touching any other part of the system,) on the principles which the gentleman from South Carolina has urged in support of his amendment, I ask if he is ready to adopt them to their true extent? If it is now expedient to adjust this power on the principles of a purely democratic election, which shall respect the will of an actual majority of the people, will he consent that we meet him with his own arguments, and conform this compact to his own theory? The operation of the system is confessedly unequal and partial in many respects, and was originally admitted to be so. But if we are now to expunge those features of this part of the system which produce these inequalities of political power among different portions of the people, why does he not propose at once to establish a popular election within the states, and apportion the electoral power equally between them according to their respective numbers of free citizens? Will he consent to give up the power which many of the states have retained in this election on other principles? The amendment now before us preserves this inequality still, and so far from being calculated to obtain in the election of the

President the will of an actual majority of the people, must operate on principles which may defeat the choice of that majority, and yet unite a majority of electoral votes in favor of some one candidate. It appears to me that, in this respect, the amendment does not conform to the principles on which it is supported—and it must undergo at least one essential modification, before it can produce the result which the gentleman from South Carolina deems so important to be attained in the election of the President. The reservation of power which it contains, growing out of the extent of the slave population of the states, is contradictory to the principle on which he so highly recommends it to our favor.

If, then, sir, I have not mistaken in this discussion the first principles of the constitution, this part of the amendment before us is incompatible with our system of government. It has been supported, however, by several considerations growing out of the operation of this elective power, which require some examination before we assent even to its expediency. The gentleman from South Carolina entered into a comparison between the merits of the district and general ticket systems in the United States, and inferred from the views which he presented to us, that the former was to be preferred. He introduced this part of the discussion by stating that whatever might be the rule, it was desirable that it should be uniform in all the states. This, sir, must depend on the extent to which we may be disposed to apply this principle in the exercise of the elective power, in any constitutional amendment upon which we may finally agree. If uniformity is desirable, (and it may be more or less so in all systems,) it is most consonant to a representative system, to introduce that uniformity of rights which tends most to equality, not only in form but in more substantial and important matters. If it is admitted, that the elective right is a state power, the mode of choosing electors must be adjusted by their particular views of their own interests and on principles which they themselves think



to be most conducive to the security of their just influence in the presidential election. The people of the several states, having subjected this right to their own regulation, may find much of its value to consist in preserving it under their own control. If perfect equality of political power can be attained in all the states, I am not certain that I should not prefer to adopt the district system: but under the present distribution of the elective power, (which this amendment leaves untouched,) there is not to my mind any value in this principle of uniformity but its name, and its introduction may be adapted to produce very great inequalities in the results of its operation. The comparison, which the gentleman drew with great accuracy, between the present operations of the different elective systems adopted in the states of New York and Virginia, presented the results of these diverse adjustments of this state power in a very striking light. It may well happen in so large a state as New York, where no direct common interest or general influence is in active operation, that her electoral vote may be divided between two persons in the ratio of nineteen to seventeen, while in Virginia, her undivided strength of twenty-four votes may be given to one of the candidates, and thus produce the singular result that the effectual power of New York in the election would stand, as the gentleman justly concluded, compared with Virginia, as only two to twenty-four. He asked us, "if such injustice could be tolerated?" There is a plain remedy for all this yet within the control of the people of New York, which may preserve to that state her real elective power, and by which these states may both stand on principles of uniformity, and at the same time preserve also their constitutional equality of right in the election. To correct this possible unequal result by districting the state of Virginia, might virtually annihilate the entire power of both these large states; but if New York should change her present system and adopt the plan of a general ticket, she may resume her proper influence, and both states may retain their



respective constitutional power in the presidential election. Distraction of public opinion is indeed a great evil in any of the states, but the remedy is not to be found in the diffusion of a principle among them all, which necessarily tends to spread that evil with it wider. If the district system is so much more republican in principle, and truly democratic in its operation, that the spirit of our constitution in the adjustment of the power of the states, required its adoption, Pennsylvania, Virginia and other large states, would probably, before this time, have discovered the political virtue of such a system. One system must indeed be necessarily better than another, as the honorable gentleman from South Carolina justly said. As a general abstract proposition it may be undeniable, if the objects which the several states desire to attain be the same, and they have the same interest to cherish, and there exists, at the same time, no unjust inequality between them. But it is clearly not better that some of the states should risk the effect of an amendment to the constitution which may jeopard, by any change of system, those interests, for the preservation of which they became parties to the compact, or destroy the rights which they have reserved to themselves under it.

It is said, by the honorable gentleman, that the operation of a general ticket destroys the vote of the minority in a state, and that the consequence of that system is virtually to transfer the votes of that minority to a candidate whom they, perhaps, dislike or abhor. This argument conceals within itself a fatal error in principle. It indirectly assumes, clothe it in what dress we may, that minorities are entitled to representation as well as majorities. If there is any soundness in the position or any foundation for complaint, we must recollect that the same result must happen more or less not only in the district system, but in all elective systems whatever. The only real difference in principle in the two plans before us, is, that the minority, on the plan of a general ticket, may

be much larger than the minority of a mere fragment of a state on the district system: or, we should rather say that such a minority appears larger only because it is a congregation of lesser minorities. But it can never be admitted as a just foundation for any argument whatever in any elective government or system, operating in a large or small state or anywhere, that the minority have any rights like these. If in the choice of the President, the elective power is a state power, the general ticket system is founded on sounder elective principles than the district plan; and it is, *a fortiori*, more so if this part of the constitution was adjusted on the principles assumed by the honorable gentleman, that the object of the constitution was to obtain the sense of a majority of the people of the United States in that election. The first and only certain mode of obtaining the sense of a majority in a particular state or of the whole people, must necessarily be by a general vote throughout that state or the union. If a general vote in the union is not resorted to, the next mode of ascertaining or rather approximating to the will of a majority, would seem to be the distribution of the elective right among the largest masses practicable. It is true that if you divide the entire vote even into two masses only in the election, a single chance is created that the minority may perhaps control, (for they might clearly paralyze) the majority. The more you multiply the number of these masses, the further we remove the final result from that which we profess to attain—the will of a majority of the whole union. To illustrate the principle for which the gentleman contends, he supposes a case might happen, in which, by the general ticket system, the vote of the state of New York might stand between two persons in the ratio of nineteen to seventeen—that, under that plan, the votes of the minority, which may have been designed by the “people” to defeat a particular candidate, are totally sunk in the estimate of the vote of the “state.” This only proves, sir, that the minority, in such a case, must submit to the will of a major-

riety. There is some error in this argument arising from the use of terms. It would, in my opinion, be more correct to say, that the persons who compose such a minority may have failed in their expectation of defeating the sense of the people: for the will of the state and the will of the people of a state, are merely convertible terms when we speak of the presidential election. There cannot, in my opinion, sir, be contrived by any ingenuity, a scheme which may so effectually defeat not only the will of the people of the several states, but of the majority of the union as the district system. It carries within itself the chances of that result, multiplied in the same proportion that we increase the number of the districts in a state, or their aggregate in the union. Under the general ticket system, and throwing out of the account the votes derived from senatorial representation, no person can be elected unless he obtains a majority of the electoral votes in the gift of the people, voting on the basis of their true constitutional power—by states. If there is occasionally any inequality under the system of voting by states, like that which the gentleman from South Carolina supposed in the comparison which he drew between the separate result of the election in New York and Pennsylvania, voting by states, and the result of a vote in those states if united in one common mass, these inequalities are much more striking and more highly mischievous under the district system. It is by this system that the minority of a state may effectually defeat the will of a majority. Let us consider what may be its effect on the vote of New York, in the election of a President, on a division of the popular power of that state into thirty-six electoral districts. Let us suppose that the aggregate of all the surplus majorities in nineteen of these districts, every one of which are in favor of one person, is fifteen thousand votes; and that the aggregate of these majorities in the remaining seventeen districts, all of whom are for a different person, amount to twenty thousand. The effect of this system is, in that case,



certainly to defeat the will of the people as a state, and to give to the minority more efficient power in the election than the majority. If we trace the consequences of this plan still further, we shall find that it may happen that a single district may give a greater majority, for instance, a majority of ten thousand for one person, when the aggregate of majorities in the whole remaining thirty-five may be only five or nine thousand for a different person; and in such a case, the power of a minority under the district system is to that of an actual majority in the state, as thirty-five to one! This effect of the system is by no means problematical. I am not indulging in fanciful theories on its consequences in the states, and its probable tendency to defeat public opinion. Experience has already, in numerous instances, confirmed the truth of these, its fatal effects, on the will of the people. The history of many elections in the states which have adopted that plan, if they are examined, must show that such is its tendency. If the general ticket system, on any political hypothesis of the constitution, occasionally disregards here and there, in the states, the minority of her votes, the district system, within such a state, directly leads to the still more heretical anomaly of principle, which defeats the will of the majority, or completely paralyzes the power of the state. Such a state may as well at once be struck out of the political system in the presidential election. It is a mockery to call for the expression of the will of the people, when the very organization on which we profess to obtain it fairly, is only calculated to defeat it altogether. Under the general ticket system, the true original principles on which this elective power among the states was adjusted by the constitution, is completely preserved, and the will of the people of the several states, as states, is strictly regarded, and takes its full effect on the election of the President. Before we adopt any amendment whatever to any part of the constitution, we must be satisfied that it proposes some valuable improvement to the system. The

question before us is not altogether even whether, under the principles on which this power was settled among the states, there may not be some necessary inequality, or some incidental inconveniences. It is possible that it can be improved; but we are first to determine whether the plan proposed by the honorable gentleman from South Carolina is a better one, and so adapted, in its operation, as to remedy these inequalities and inconveniences. Until we are satisfied on that point, I trust we shall not give our assent to it. If the general will of the people of all the states as a common mass, is the end which it proposes to respect, it is, in my opinion, better calculated to defeat the very object which it professes to attain with so much certainty.

It is further urged in support of the introduction of this system, that it is adapted to remedy the evils which have sprung up in many of the states from the establishment of what has been commonly called the caucus system; that the necessary consequence of the general ticket plan is to throw the power of the states into the hands of political managers, who wield this elective power for the accomplishment of their own political purposes. Whatever may be the names which we may give to systems of this sort—whether we denominate them as caucuses, or if, as in Pennsylvania, they assume the somewhat less offensive appellation of conventions, I shall not here enter into any particular examination of their merits; nor shall I differ at all from the justice of the views of these systems, which have been presented to us, or are to be inferred from the lights in which they were presented by the argument of the honorable gentleman from South Carolina. But, sir, the true remedy, after all, against the operations of these party systems, is to be found in the stern independence, sagacity and integrity of the people. The moral power of this system can only be sustained by public opinion co-operating with it to the same common end. It may, in some degree, tend to the more perfect organization of party—its dis-

cipline, efficiency and activity; but it is to be most successfully met by public opinion, and its operations defeated by the independent exercise of the elective power of the people. It is not in the presidential election alone, that it finds the policy which has given it existence in the states; and the district system in that election, will not annihilate the party interests which sustain it. New York has adopted the district plan in that election, and yet this system has been there revived—perhaps, with as much efficiency as it ever had. In the choice of electors, I doubt if the district system will provide a complete remedy against the party influence of this political machinery, even at the risk of another evil, the fatal annihilation of the elective power of a state. So long as this party system collects itself at one point, its evils are more fully exposed and accurately judged of. It awakens the jealousy and keeps alive the vigilance of the people. It then presents a single power, against which the moral energies of a whole state may be directed, and if crushed in such a contest, it rescues from the general wreck no remnant of the elective power. Diffuse it and it still operates silently and unseen. The “central power” still keeps in motion, in other forms, the elements of party organization, and it will still find its way to the remotest corners of a state. So long as it remains concentrated, its power may be subdued; but diffuse it, and it carries its contaminating influence throughout the body politic, tainting the whole system and corrupting the vitality of our social institutions.

The view which the honorable gentleman presented to us of the effect said to have been produced in Maryland, by a few votes, on some occasion, from which it was inferred, that only ten or a dozen men, composing a surplus majority, produced an entire political revolution in that state, attributes much more to their elective power than they are entitled to. It is not the surplus, over a bare majority, whose will alone determines any question. These are but the component parts, which constitute the whole number of



voters, which make up the entire mass of the majority. The constitution was adopted in the convention of Virginia by only ten votes, and the late declaration of war passed one branch of Congress by a majority of only four or five votes. It can hardly be considered as just to say, that ten men adopted the constitution of Virginia, and half a dozen only declared the war against Great Britain. This notion was, on that occasion, carried so far, that I well recollect to have seen or heard of a book written soon after that war commenced, the scope of which was gravely designed to prove the extreme impolicy and absurdity of going to war on the vote of five or six men only! A member of this House, from the state of Pennsylvania, and one of the representatives from the city of Philadelphia, or its vicinity, was once returned here by a majority of only one vote out of ten or twelve thousand; but we should hardly say, that he was elected by one man, or if we do adopt that absurdity, we might as well add, that, as he was elected by one person, he was to be considered here as representing that person only.

On the other branch of these amendments, included in the proposition before us, we could have voted more satisfactorily if the resolution itself contained the details which the honorable gentleman suggested in his remarks to be his intention to couple with this part of the amendment. He states, that if we should agree to take the ultimate choice of a President from Congress, he proposes to provide for the contingency of a second election, by sending back to the people either the two highest candidates, or the persons having the two highest numbers of votes, (I did not precisely understand which, and it is immaterial to the view which I shall take of the proposition,) for a second choice by the people, voting throughout the states by districts, between such persons only. We must, therefore, treat this resolution and this plan as one proposition, and consider its merits in connexion with such a system. The principal argument in favor of taking the election from this House, is founded on the danger that this

power may be abused in the hands of the representatives of the several states here. This argument directs itself against the existence of all political power and all institutions of government among men. If the innocent and pure are most liable to fall, by reason of their too confident security, this power here might be more dangerous still. Now, sir: to my mind, this species of argument, drawn from the possible abuse of political power in all governments, only proves that it is much better to go back at once to a state of nature, and derive our notions of government from the social institutions, (if social they are, in any sense,) of the aborigines in our vicinity. If this argument is received by any one who is willing to act on the faith of it, it may present to him inducements to abandon civilized society and unite himself to the savage tribes; but it can receive but little favorable consideration anywhere, when we remember, that in all our forms of government, there are restraints, both moral and political, which entitle all public bodies to some confidence. The obligations of an oath and of honor—the power of conscious virtue and the love of one's country, are securities which bind men to their integrity everywhere. If this House is not to be trusted by the people to whom it is directly responsible, and no confidence is to be reposed on our integrity in this point, it deserves but very little on any other. But, sir, the honorable gentleman has derived much of the force of this argument from the liability of this House to be corrupted by men in power. This illustration is but the same argument presented in another posture. The one is founded on the innate depravity of the body itself, and the other on the danger of its contamination from evil men. If we indulge in the conclusions which are drawn from these considerations, we may come to the conclusion at last, that the people themselves are not to be trusted in the exercise of their elective rights. If those, who are elected directly from the mass of the people, are not to be trusted at all, how dangerous might a direct election by the people, of their



President, prove to be, on the hypothesis of the honorable gentleman. If this House is so peculiarly liable to be misled or corrupted by men in power, is there nothing to be apprehended among the people, from men out of power? Whatever may be the extent of the influence which men in power may obtain in this House by "fawning and flattery," there is some reason, in all elective governments, for the people also to be on their guard against the arts of men out of power, who, in the disguise of friends of the people, may flatter their pride, fawn upon their favor, and finally steal away their rights. The evidences of this danger are neither few nor obscure in history. Among all the views from other times and other countries, which the honorable gentleman drew to his argument, he might have found, in the history of every republic, at least, some striking illustrations of this danger. My own reflections on the nature of this government have led me to a conclusion directly opposite to that of the honorable gentleman. If this government is to be demolished, it will never find the weapons of its destruction in the hands of men in power. The Prætorian bands will never be led up to that fatal work from this House. There are great masses of feeling in different parts of the nation, and common interests, which affect great sectional portions of the country, which must be first inflamed and put in motion by those who seek for power—the spirit of anarchy will say to the north, "your commerce is to be annihilated"—to the south, "your internal security is in danger"—and to the west, "your inheritances are to be taken from you and your political power is trampled upon;" we may then look among the people for those who, flattering their prejudices, fomenting their passions, stirring up the deadly elements of party hatred and exasperating the bitterest feelings of human infirmity, persuade them to consider their public men and statesmen as traitors to their interests and to treat them as public enemies. Then, sir, we may find amid the confusion of this tumult of passion and popular



phrenzy, tyranny, in its incipient garb and yet unfledged with power, mounting itself on "young ambition's lowly ladder." If we are really so unfit to be trusted and so little disposed to regard public opinion and the rights and will of our constituents, the honorable gentleman might have spared all his labor to convince us of the propriety of this amendment. Experience and the history of our own country have not, in my opinion, yet shown that either the integrity of this House or the country is ever to be corrupted by executive influence or made subservient to the will of that department. During the presidential term of Washington and with all the great and well-deserved moral power of his character, the House of Representatives at times feebly supported his general policy in the administration of the government. The administration of his successor closed its term after a very doubtful support by the legislature; and the first Congress which convened in the next year, reversed most of its public policy by decisive majorities. Mr. Jefferson was elected by the House of Representatives; and if the abstract principles, which the honorable gentleman has offered us as the tests by which we are to be governed in making up our judgment on the conduct of public men and the motives which guide them in the distribution of patronage, are just, to what a deplorable situation should we reduce the respectability and moral value of that high station in the government of this free country! Can it be believed on any moral system, that the executive patronage, in the earlier periods of Mr. Jefferson's administration, or any part of it, was distributed as the wages of political iniquity?—or that the triumphant majorities, which supported the general policy of his administration, were maintained by executive influence?—or that the decided support, which his successor (who would seem, from the remarks of the honorable gentleman, to have been endowed with political sagacity scarcely competent to select from the country a cabinet,) found during his whole term

in both branches of Congress to all his public measures, was preserved by the power of his personal influence or even of his patronage? During the next administration, I may appeal to many who are yet here to say, if during the greatest part of the last eight years, there has been scarcely a time when the whole power of executive influence could carry any favorite measure through the House. On many of the most important subjects of general policy, the opinions of this House and the executive have been essentially variant—and yet I believe it will be found that a greater number of appointments to public office, of members of both branches of Congress, has not happened under any administration. I well recollect that a member of the other branch of the legislature even accepted (and, doubtless, solicited) as a miserable crumb from the executive table, the paltry place of a collectorship on one of the northern lakes. I can never bring my mind or my feelings as an American, to suffer myself so to judge of our executives as to estimate the motives which may actuate them by the hard rules which the gentleman from South Carolina assumes—let them have come to that high station by a constitutional election under any circumstances whatever. They are tests of such severity that no man can stand the trial. If the executive appoints his friends to office, 'tis corruption; if he appoints his enemies, 'tis corruption still. If he appoints his friends, he pays; if his enemies, he buys! Are these, sir, the unsparing judgments which a generous people will pass upon their public men? Are we to cherish, for a moment, doctrines which lead to such denunciations of all that we are taught by our national pride and the character of our institutions to respect? What should we say of the justice of other nations, should they apply to our free government these bitter reproaches? Let the advocates of the divine rights of monarchy and kings themselves, when they behold this great fabric of civil liberty, say in the envy of their hearts,

“How much, O Sun! I hate thy beams”—

but let us never apply to our public men, those judgments which may lead the pettiest prince of Europe to look down upon the President of this free and enlightened people with contempt. The people of this country will not respond to the sentiments which we have heard. Believe me, sir, they are too jealous of their own honor and the reputation of their government, and too generous in their nature, to cherish such injustice to their own institutions and their own statesmen. If we invoke these judgments upon those who hold the most eminent stations in the government, by what rule shall we ask them to judge of us? When Mr. Madison called from his retirement in that state which you, Mr. Chairman, have the honor to represent, to the public service of the country one of her most illustrious citizens and public benefactors, whose name and memory will be revered as long as distinguished talents and eminent public virtue shall be respected and honored anywhere, was Bayard—purchased? If the living only were involved in these tests of public integrity, we could bear them with more composure; but we must certainly wish that those judgments had been spared which may inscribe a sentence so revolting to our feelings on the sanctuary of the dead. When more recently, one of our most excellent and accomplished men was called from these seats to the service of his country, was Poinsett—bought? If it is honorable to die in the service of one's country, is it disreputable to live in the public confidence, or to serve in its public councils? But I forbear to press these illustrations further. I do not deny that the power of appointment has been abused by some and may be by all men. But it is not every exercise of what is somewhat misnamed when we call it executive patronage, which is to be denounced as a defiling thing which contaminates all the healthful fountains of public virtue. Is it to become a stigma on the fame of men that they are called to the service or the coun-



cils of their country even from this House? If the interests of the country are better served, I know not why the path of honorable fame and honorable emulation may not be as pure through this House as through any other branch of the government, or as it may be anywhere. But few men have risen to eminence among us, or partaken of the highest confidence of the country, who have not first served her in her elective public councils. Jefferson and Adams, Hamilton and Madison—and Washington—were educated in these schools of political experience. The gentleman from South Carolina told us, with great justice, that in England there has scarcely been a distinguished public man for a century, who has not first been called to the house of commons, by the people of that country; and to this I may add that, flagrantly corrupt as the gentleman presented that political body to us—as the very purchased vassals of the crown—these eminent and accomplished statesmen were taken from the parliament and called to those exalted stations in the government of that country on which they have conferred so much honor. As freemen must be educated to liberty, (and there is nothing more true,) so public men must be educated for public stations. I do not believe in the existence of men as statesmen by instinct. One may be born with some qualities which may be suitable for other stations. Nature may, for instance, confer upon a man many qualities of a good soldier—but political science is a moral acquirement. To attain those high stations in public confidence which are so honorable in a free country, it is necessary that one should devote a long life to the study of her laws and institutions, her history, her domestic and foreign relations, the principles of her public policy, the temper of her people, the genius of her political system, and the spirit of her government; nor even then may he expect the people to confer upon him their highest honors, until he has served in their senates, passed the ordeal of public opinion as a statesman, and shown that he possesses that profound

talent, those sound political principles and great moral qualifications, which alone can adorn her public councils and perpetuate the civil liberties of the country. It is there that he learns how precious these civil liberties are—it is there that he feels the sanctity of the constitution—it is there that he draws from experience the lessons of political wisdom, and it is there that he shows his fitness to be trusted with power. When it ceases to be honorable to be here, this House must become a scandal to the nation—a by-word among the people—a reproach to the government—the scoff of monarchy, and a curse to freedom. Why, then, should we treat of it as only corruptible, and judge of it on abstract principles deduced from the mysteries of political metaphysics and the “philosophy of human nature?” The illustrations, which the honorable gentleman has drawn from the history of Rome, are not at all applicable to this country. I have long ceased to apprehend any danger founded on the existence of those causes here which destroyed that government. It was a republic (if it now deserves that name,) of a single city—uneducated and unenlightened—of condensed population, and corrupted in morals. Its dissolution only proves that the infuriated rabble of Rome, pinched up by famine or the fear of it, or dazzled by the glare of military renown, arrayed themselves under the contending chieftains of that city, and were led on by lawless force and blind infatuation, to imbrue their hands in the blood of her best citizens, and to demolish all law, and order, and the government itself. The history of these atrocious times only further shows that the vassals of Pompey and Cæsar, marshalled in the ranks of these military despots, were, at last, persuaded to cut each other’s throats. But, sir, I trust there are no analogies in this history, which we can ever apply to the educated and enlightened population of our own country. Nor is there any more reason to apprehend in all future time, so long as this government shall stand and its people shall enjoy the blessings of education

and feel the obligations and influences of religion, that we shall find any moral parallel between the election of a President and the absurd mockery and lawless violence of a Polish diet. This union is not, in my judgment, destined to be severed by such violences as these. Its dissolution is rather to be expected from the operation of other causes. It can only be accomplished by first impairing the confidence of the people in the integrity of their representatives and its public councils—in raising up against it the states, by violating their rights, and in combining against the government the moral power of the country. Then, sir, you will find how weak this political system is without this support from the nation, and it will expire without a struggle. The security for the integrity of this House is to be found in its responsibility to public opinion. This has, hitherto, proved itself to be an active and vigilant agent in the political system of all our free institutions, and as long as the people are true to their principles and themselves, we may hope that this government will stand. We may long rely, I trust, on their sagacity, independence and patriotism, for its stability. Whatever fears we may entertain of the evils of the caucus system, or the integrity of this House in the presidential election, it is to this tribunal that we must all answer. Postpone the elections in the states until after the congressional term has expired and you give this principle its full operation. In the state which I have the honor partly to represent, its power has lately been most signally illustrated. Out of fifteen members who attended the caucus of 1824, an honorable member whom I have in my eye, (Mr. Cambreleng,) is the only spared monument among us to remind the delegation of the existence of the system. If one of the objects of this amendment is to destroy the operations of any “central power” whatever, by taking the election from the House of Representatives, it is questionable, in my judgment, whether this end will be effectually accomplished. There is one security, even under the cau-



cus system, whenever the election comes to this House, which mitigates its inconveniences and evils in other respects. The members here vote under sacred obligations, which the constitution respects as its security for their integrity; and they are responsible to their constituents. But, if you take away this security, we may raise up in its place an irresponsible caucus, which is beyond even the control of public opinion. It will not be a caucus of the members of these Houses. It will become a combination of political adventurers without doors, who will there organize their schemes of power and attract to their councils a host of hungry expectants. When the election shall go back to the people a second time, they will be found engaged in poisoning their minds and rendering the public measures of their government disreputable in their estimation. They will attack the principles on which public opinion should be founded, and perplex the people with political disquisitions. The master spirits will not be seen in the public eye; and while they and their confederates, in the profoundest conclave, vainly plot the means of successfully storming the highest battlements of the constitution, which obstruct their path to power—public opinion and the virtue of the people—others shall, as patriots,

“Retreated in a silent valley, sing  
Their own heroic deeds”——

“Others apart, sat on a hill retir’d,  
—— and reasoned high

Of Providence, foreknowledge, will and fate,  
And found no end in wandering mazes lost.

\* \* \* \*

Vain reason all, and false philosophy!  
Yet, with a pleasing sorcery, could charm  
Pain, for a while, and anguish—and excite  
Fallacious hope.”——

In all my reflections on the various propositions, which have been made from time to time, to amend the constitution, in the election of the President, I have come to the conclusion, that the best plan for us is to go back to the original system. Although nei-

ther that, or the amendment of 1802, can yet be said to have had a fair experiment, yet if any thing is to be done, it is wisest, in my opinion, to retrace our steps. That plan contained within itself at least an effectual remedy against the operations of the caucus system. Although no amendment can prevent a systematic preconcert of party in the election, yet it was in the power of any of the small states, or a few electors, perhaps one, under that arrangement of the elective power, to defeat the election of a particular party candidate, as President. It was a valuable improvement on the pure democratic principle in that election, and was calculated always to secure, in the two highest stations of the government, public men of the first grade of character. The small states lost much of their power when they gave up this system. The caucus system received its perfection from that amendment. In relation to the Vice Presidency, it is calculated to operate, in bad times, as a mere bounty of twenty thousand dollars for personal influence. Much as the small states lost by that amendment, the plan, now offered by the honorable gentleman from South Carolina, proposes, in effect, to take away from them the only remnant of their power. The amount of political power, which they are now to retain, and the benefit which they are to derive from its adoption, is to reduce them to their original electoral votes, under every contingency, except the remote chance of a tie in the second election. If they can find an equivalent in districting the large states, for the loss of what they yet retain, they will doubtless be in favor of the amendment. There is, in my opinion, no analogy, as the honorable gentleman stated, between this and the original system. It is, indeed, true, that two candidates only are to be sent back for the second choice, but the large states are yet to retain, in that event, the whole number of their electoral votes.

The plan of sending back to the people only the two highest candidates is founded on the assumption, that in case a majority of the people should not unite in the first instance on any person, their second choice

must necessarily be for one of the two highest. In this respect, the chance of electing the person, whom the people might select in the second election, is as much, if not more, remote than under an election by the House on the existing plan, which presents three persons for our choice. It is far from being certain that in every case, the second preference of a majority of the people would be for one of the two highest. It may happen that a particular candidate who might, by chance, obtain the second or even the greatest number of votes might be so obnoxious, that those who voted for the other two out of the three highest, would desire to unite in the second election on the least of the three. We have already had four persons voted for at the presidential election, and the number is perhaps rather to be generally expected to increase than to diminish. The two highest may, in many elections, have but a comparatively small proportion of votes, which will be very far from a near approximation to a majority. Under the plan now offered, the people may be necessarily coerced themselves to elect a President against their will. There is to be no alternative more congenial to the feelings or wishes of the actual majority, and the scheme, in such a case, is calculated to defeat public opinion. It has not, in many respects, even the comparative advantages of a choice by plurality in the second election. If it was admitted, out of deference to the argument, that a choice by the House of Representatives out of the three highest by a majority of states, would in many cases defeat the wishes of the majority of the people, it is not improbable that the plan now offered would much oftener produce that result. It proceeds on the principle that it is of necessity to be inferred that a majority would unite on one of the two highest pluralities, and as it sets out on this false hypothesis, it leads in the conclusion to its own refutation, and brings the argument, thus founded on unsound abstract principles, directly to the *reductio ad absurdum*. The error lies in the premises and it is not singular that the deduction should be equally vicious in principle.



But, sir, I will detain you no longer with my views of the incongruity of the principles on which these propositions rest—the inefficacy of the amendment to accomplish even its professed ends, and its impolitic and dangerous disturbance of the rights of the states. I ask of the committee if the present period is auspicious to the renovation of this compact. When this constitution was framed, we had been recently chastened by adversity and the states then deeply felt how great their mutual obligations were, and they had no interest but to be just. But circumstances and the times have changed, and we are now in the days of our prosperity. The relative population and power of the states are no longer the same, prejudices, too firmly established, have crept in and parties have arisen among us. Great sectional interests have sprung up in the states and a whole nation has been brought into existence beyond the mountains. Public feeling has lately been deeply agitated and the country is not quiet. I submit it to the dispassionate judgment of this committee, to say if it is now discreet to agitate this subject. I trust there are no well grounded apprehensions of any immediate danger to the country. I confess that there have been times when, in the conflicts of party and the convulsions of national feeling, I have too credulously thought that the moral power of this government was too weak to sustain the union—but experience has shown us that these fears are groundless. Though the collisions of separate and sectional interests may, at times, alarm the most confident, yet, if we examine our history and consider how well our institutions have maintained our interests abroad, advanced our common national glory and secured our civil liberties at home—and if we further look around us and view the sum of national prosperity and individual happiness which is enjoyed throughout our country, there is abundant consolation for our fears, and we may confidently trust that, under the blessing of Providence, this empire of civil liberty will be perpetual.

# SPEECH OF PELEG SPRAGUE,

ON A

BILL FOR THE RELIEF OF THE SURVIVING OFFICERS OF  
THE ARMY OF THE REVOLUTION,

DELIVERED IN THE HOUSE OF REPRESENTATIVES OF THE UNITED  
STATES, APRIL 25, 1826.



MR. CHAIRMAN,

SUFFICIENT, perhaps, has already been said in behalf of the officers of the revolution. I propose to say something for the soldiers also. I am in favor of the amendment which has just been offered by the gentleman from Massachusetts, (Mr. Reed.)\* I believe that the soldiers of the revolution have a just claim upon us for a much larger amount than any that has been proposed to be given to them. We owe them a just debt, and it arises from our violations of our engagements to them.

In the first place, as to their wages. We were bound to have paid them in money. This we did not do, but delivered them merely paper, or certificates of debt, which were not money; they were not the measure of value, but their own value fluctuated, according to the varying opinions of the times. They were an article of trade in the market, and, like every other kind of merchandize, their real value was their market price; which was from an eighth to a tenth of their nominal amount. The soldier, then, was compelled to receive an article at eight or ten times its real worth, so that, in fact, he obtained, at most, but an eighth part of his wages. I say at most: at times, indeed, it was far less. The gravest of our historians has told us, that at one time,

\* Mr. Reed had proposed so to amend the bill as to extend its benefits to the surviving revolutionary soldiers.

such was the depreciation, that the pay of a captain would not have furnished the shoes in which he marched against the enemy, and many expended their little all in supplying themselves with the humble accommodations which their stations required. We have thus paid to the soldiers but a small fraction of their wages. Our country was in the condition of an insolvent debtor, and made but a small dividend among our creditors. Why should we not now, when we have the abundant means, make payment of the residue? It has been said, that we should pay nothing now, because it has cost the United States the full nominal amount, as the government eventually redeemed the paper. If it were so, what matters that to the soldier? If a creditor is offered an article, at ten times its value, in discharge of his demand, is it of any consequence to tell him how much it cost the debtor? Suppose we had compelled the soldier to take any other specific article, at such an enhanced price, and he had remonstrated against being thus defrauded, would it be any answer to say to him, "we purchased the article on credit, and our credit was so bad that it cost us much more than it was worth?"

Sir, that which we did deliver, in payment, rested wholly upon our credit; if that credit was so defective that it cost us ten times its real value, is the whole loss to be thrown upon the soldier? Was it his fault that we did not discharge our duty and sustain our credit?

But, again, it is objected, if he had retained the paper long enough, he might have obtained full payment. That is, if he had kept the article on hand, for a series of years, it might have risen in value. And what if it had? Does not every one know that the price which a thing bears, when it is received in payment, determines the amount of the debt thereby discharged, and that its subsequent rise or depression cannot increase or diminish it? And besides this, are we to say to the poor soldier, who expended his last farthing in our defence, who could not even reach



his home without charity, and was compelled to part with his certificate to save himself and his children from starvation—shall we say to him, you ought to have kept your paper ten long years, and then you might have obtained the full amount? It is but a mockery of his wrongs to tell him, if you had done what was impossible, you might have been paid. I will not pause to estimate the amount of loss sustained by depreciation, because, the reflection of a moment must satisfy every one, that it very far exceeds the sums named in the bill and the amendment.

But, sir, independently of the depreciation, we have never yet paid the full amount of the paper or certificates which we compelled the soldier to receive. It is well known that, in the funding of the public debt, which took place nearly ten years after the close of the war, and more than ten years after much of the debt was contracted, the interest was not paid, but funded on interest of three *per cent.* payable at the pleasure of the government. The principal was not paid; but two thirds was funded at an interest of six *per cent.* and interest on the other third was deferred for ten years. From this statement merely, the loss to the creditor does not appear to be great; but in order to exhibit it truly, let us take an example and compute the loss sustained by the holder of paper for one thousand dollars. The simple interest for ten years was six hundred dollars, which was funded at three *per cent.* Such was the pressure of the times, and the high rate of interest at that period, that it has been estimated that the amount thus funded was worth but fifty *per cent.* To be within bounds, suppose the difference to be one third, then the six hundred dollars, thus funded, was worth but four hundred dollars, and the loss was two hundred dollars.

One third of the principal bore no interest for ten years. Simple interest for that time on one third of a thousand dollars, amounted to two hundred dollars more, making the loss four hundred dollars. Simple interest upon this sum, for thirty years, exceeds seven

hundred dollars, which, added to the four hundred, makes the loss, which the holder of paper to the amount of one thousand dollars has suffered, by the mode and time of payment adopted by the government, to exceed eleven hundred dollars; so that the sum which we withheld, out of that which we had solemnly promised in writing, with simple interest only, is now more than the original amount of the debt.

Again, sir, the soldier had a right to demand money of us, and that, too, at a time when he was in the utmost distress for it. If we could not pay it, we should at least have put the debt on interest, payable quarterly, as a funded debt, from the beginning. This we could have done; and, as we did not, we are now bound to place him in as good condition as he would have been in if we had performed our duty. And, if we had paid interest quarterly, could he not have realized as much as interest compounded annually? Would not every honorable man pay so much to an individual whom he had thus wronged? And if gentlemen will make the computation by this rule, they will find that we should now pay more than three thousand dollars to every one who was an original creditor to the amount of one thousand! A startling amount truly. Gentlemen, however, need not be alarmed; they are not asked for such a sum, nor any thing like it. Only a small part, even of the simple interest, is now requested. But, I thought it not amiss to suggest to them how much might be demanded, upon principles, which it would be difficult, in fairness, to contest. So much for the loss to our creditor. Was there not a corresponding gain to ourselves? I know it has been said, that we paid and redeemed our paper. But, sir, it is a matter of history, that, by the mode of payment, as it has been called, or rather, by the non-payment of our domestic debt, we saved the full amount of thirteen millions of dollars out of the sum which we had expressly promised—out of the face of our bond! If this sum had been paid, or funded then, we must have paid interest upon it until the present time; for we have ne-

ver yet been out of debt ; and our national finances are now in a better condition, by at least fifty millions of dollars, than they would have been if we had fully paid our domestic debt. We have, then, in our hands, fifty millions of dollars which belong to our creditors, and which sum we have no right to retain, if they come forward to claim it. And now the most meritorious of those creditors ask for less than one year's interest of that sum, and yet we are told that we ought to reject their demand.

The soldiers of the revolution might present still further claims upon us. When we enlisted them into our service, we entered into other engagements to them besides the payment of their wages. We bound ourselves to furnish them suitable food, clothing, tents and medicines, and all the necessaries of a soldier's life. How was this stipulation fulfilled? Let our history—let Washington himself answer this question. How often, and how feelingly, do they repeat and reiterate the wants and sufferings of the army, through our violation of our engagements! They declare that “actual famine” existed in the army; that the soldiers had been “half the time without provisions,” and had “no magazines nor money to form them;” that they “were bereft of every hope from the commissaries; and, at one time, the soldiers ate every kind of horse food but hay, and were perpetually on the point of starving.” As to clothes, they declare, “that neither the bodies nor feet of the soldiers were protected from the frosts and cold of the inclement season, and, after being exposed through the day to the rigors of winter, night brought no relief;” that they “were without clothes, and without blankets, and, at one time, amid the frosts of winter, nearly three thousand men were barefoot in camp, besides the number confined to the hospitals for want of shoes.” And Washington describes their distress in these emphatic words: “Our sick, naked! Our well, naked! Our unfortunate men in captivity, naked!”

Such, we are told, by the highest authorities, was



the lamentable deficiency of the primary articles of food and clothing; and that, as to all minor necessities, they were almost unknown. They tell you, that, in every department, the utmost distress prevailed, and that many, very many, sunk under their accumulated hardships; that, from incessant toil, from insufficient and unwholesome food, from want of vegetables, want of tents, and want of clothes, great sickness prevailed; the hospitals were crowded, and, the medical department being unprovided, great mortality followed, and unusual numbers were carried from the hospitals to the grave. Do not sufferings like these deserve some consideration? Will not the merest niggard of justice, calculating only dollars and cents, admit that they have a right to demand from us the value of the food and clothing, and other necessities, which we wrongfully withheld? And will not every mind, imbued with sentiments of moral right, spontaneously declare, with Washington, that compensation ought also to be made to them, for the tortures which we inflicted by our neglect and violation of our duty? The amount I will not attempt to estimate. Let gentlemen recur to our revolutionary struggle, and consult their own hearts and their own judgments, and then say what is due to the soldier, who, feeble and sinking for want of food and sustenance, marched, during the day, through snow and ice, on naked feet, exposed unclad to the winter's cold, with no resting place at night but the earth, and no covering but the skies; passing through sufferings which human nature could not sustain unbroken; and falling a prey to pestilence, more deadly and far more terrific than the sword of the enemy. Cheerfully did he face the cannon's mouth, and dare a soldier's death on the field of honor; but what rewards, in your power to bestow, would have purchased his consent to meet all the loathsome forms of disease—to breathe the hospital's nauseous contagions, or the corruption of a prisonship, and linger through protracted tortures, unheeded and unknown, toward an inglorious death? Let him.

who has felt the withering hand of disease, say what atonement we should make for causing horrors like these.

I have thus, sir, endeavored to state the grounds upon which I contend that injustice has been done to the soldiers of the revolution. In the first place, making payment of their wages in depreciated paper. Secondly, withholding a part, even of the nominal amount, which we had promised; and thirdly, other breaches of contract on our part, causing peculiar privations and sufferings to them.

And now I would ask, sir, who are the men whom we have thus grievously wronged? Are they mere hirelings, to whom we should be content to weigh out justice by the grain and scruple, or are they our greatest earthly benefactors? They were actuated by higher and purer motives than any soldiers that ever assembled, and exhibited a spectacle of unyielding fortitude, and self-denying magnanimity, unequalled in the annals of mankind. Others, under a momentary enthusiasm, or in the hurrying fever of battle, have fought as desperately. Others, when far from succor and from their country, have endured and persevered for individual self-preservation. But where, in all history, is an example of a soldiery, with no power to control them, who, in a single day, perhaps, could have reached their homes in safety, voluntarily continuing to endure such protracted miseries, from no motive but inward principle and a sense of duty? They were imbued with a loftier and more expanded spirit of patriotism and philanthropy, and achieved more for the happiness of their country, and of mankind, than any army that ever existed. And where is there an example of moral sublimity, equal to their last act of self-devotion, after peace and independence had been conquered? That army, who had dared the power, and humbled the pride of Britain, and wrested a nation from her grasp; that army, with swords in their hands, need not have sued and begged for justice. They could have righted their own wrongs, and meted out

their own rewards. The country was prostrate before them; and if they had raised their arms, and proclaimed themselves sovereign, where was the power that could have resisted their sway? They were not unconscious of their strength, nor did they want incitements to use it.

The author of the celebrated Newburg letters told them, your country disdains your cries, and tramples upon your distresses. He conjured them, in the most eloquent and energetic language, to exert the power which they held, and never to lay down their arms until ample justice has been obtained. He warned them, if once disarmed and dispersed, your voice will sink; your remonstrances will be unheard; you will grow old in poverty, and wade through the vile mire of dependency. What was their answer, when thus urged and thus tempted? With one voice, they spurned the dark suggestions, voluntarily surrendered their arms, and submitted themselves unconditionally to the civil power. It was then, that their illustrious commander said, in the words read by the gentleman from Pennsylvania yesterday, "Had this day been wanting, the world had never seen the last stage of perfection, which human nature is capable of attaining." They quietly dispersed and parted for their homes, in every part of your wide domain, unrewarded. penniless, carrying with them nothing but the proud consciousness of the purity and dignity of their conduct, and a firm reliance upon their country's honor and their country's faith. And what return has been made to them? Have they not found your high-blown honor a painted bubble, and your plighted faith a broken reed? Have not those dark predictions of your ingratitude, which you then indignantly repelled, as slanders foul and base, at which you were ready to exclaim, "is thy servant a dog, that he should do this thing?"—have they not been too much realized? Have not the petitions of the soldiers of the revolution been disregarded? Have they not grown old in poverty? Do they not now owe the miserable remnant of their lives to charity? Sir, if we change not



our conduct towards them, it must crimson with shame the front of history.

I will here notice some objections which have been urged against the bill. The gentleman from North Carolina, (Mr. Alston,) and the gentleman from Tennessee, (Mr. Mitchell,) have insisted that there are others who have equal claims with those who composed the army of the revolution; such as served in civil offices, or furnished articles of necessity to the government. In addition to what I have already said, it would not be difficult to show, that there are many points of clear and marked discrimination between the cases. But I will not consume the valuable time of this committee, by running parallels, or making comparisons which would be useless: for, if it be as the gentlemen contend, it cannot affect the argument. I have endeavored to show, and, in my humble judgment, have shown, that we owe to the soldiers of the revolution a just debt. The gentlemen say, that we owe others also. What then is the inference? They say, that we should pay neither. I say that we should pay both. We should be honest at all times, and towards all men. The principles which I advocate, are those of good faith and eternal justice, and it is no answer to tell me, that they are applicable to other cases beside those before us. I shrink not from following out these principles. I would extend them to all cases to which they can be legitimately applied. But then, it is objected, that those other creditors cannot now make out their claim, and we cannot extend them relief. And, if we cannot do all that we ought, shall we, therefore, do nothing? If some of those whom we have wronged, have been placed by time and death beyond the reach of reparation, shall we, therefore, spurn from us those long suffering creditors who are now suing for justice at our hand? This may be policy; it may be expediency; it is not right.

The gentleman from North Carolina, (Mr. Alston,) is alarmed at the expense, and warns us to count the cost of the measure proposed. Are we then to pay our

debts only when it can be done at a cheap rate? Are we to preserve the national honor and the national faith, to exercise justice and gratitude only when they will cost nothing? Sir, the able exposition of the state of our finances, made by the committee of ways and means, at the present session, shows that the treasury can meet the drafts now proposed upon it, without interfering with any objects of national importance. But were it otherwise, in order to discharge these most sacred obligations, I would retrench and economize. I would do what an honest man should to pay his private debts, "rise up early and sit up late, and eat the bread of carefulness." I would yield to no allurements, but pare down our expenditures to the point of absolute necessity. I would bar all Oregon establishments, stop short on our roads, canals and railways, and even pause in our system of fortifications for national defence; for, the confidence and affection of the people, founded upon our justice, is a safer bulwark than would be a wall of brass encircling our whole dominions.

It is said by the gentleman from North Carolina, that the states, individually, have done much. Have they discharged our obligations? If we have cast our benefactors upon their charity, and they have relieved a part of their sufferings, does it absolve us from our duty? Is it not rather a stinging reproach, which should stimulate us to make instant reparation for our past omissions?

There is no danger from the precedent to be established: for precedents can only apply to cases that are similar. And can claims like these ever again arise? Can time go back? Can this nation revert to a state of colonial vassallage? Can we return to the wants and the weakness of infancy, and, writhing under oppression, be driven to the desperate struggle for existence? Can the scenes of the revolution be acted over again, and your soldiers, unclothed, unfed, and amid indescribable horrors, again bear you on their swords, through darkness and blood, to inde-

pendence; and then be sent away unrewarded, to pine in neglect and misery, for nearly half a century? Can these things ever be again? And suppose that, in the course of human events, our country should be so reduced, that we should have nothing to pledge but our honor, and should be engaged in conflict with a gigantic power, in which life and liberty should be at stake, should we then regret a precedent like this, inspiring confidence in our faith, and giving vigor to our soldiers, to redeem us from impending destruction?

We have heard much about pensions, and have been told by the gentleman from North Carolina, (Mr. Alston,) that the pension law of 1818 was so ruinous that we were compelled to repeal it in two years. And the gentleman from Virginia, (Mr. M'Coy,) told us, on a former occasion, that our pension system was more extensive than that of any other country; that the present laws went too far in favor of the soldiers of the revolution, and he would repeal them. This word, pension, is held up to us as a name of terror. There has been an odium attached to it, which has been, in some degree, extended to the persons who are pensioners, and thus, I apprehend, a shade of prejudice has been cast over the soldiers themselves. I am never disposed to dispute about words; but they ought not to be so used as to misrepresent things. This term, pension, as we all know, is borrowed from England, where it is justly hateful: for, to use the words of her great moralist, the giant of her literature, it is there 'generally understood to mean the pay given to a state hireling for treason to his country.' Is a term of infamy like this to be transported hither, and applied to the scanty and hard-earned rewards bestowed on the most self-devoted of patriots? Those who would alarm us with the idea that we are following the example of Great Britain, should remember, that pensions there are often drawn from the poor and humble, and generally bestowed on the powerful, to swell their luxury and bribe their support to the



ruling powers. But what we call pensions here, are bestowed upon the poor, and decrepit, and miserable, to give them merely the necessaries of life. Why have we thus applied the word pension? Is it not because we were unwilling to give to our acts their true name, the tardy and stinted payment of a just debt, but chose rather, out of vanity, or as a flattering unction, to call them gratuities: that we might appear to be generous, when we were hardly just. I care not for names; but I would not have gentlemen, who have christened their own offspring in their own way, now quarrel with and discard it, for the name it bears.

It has been said by the gentleman from Virginia, (Mr. M'Coy,) and the gentleman from Tennessee, (Mr. Mitchell,) that we have already made provision for the poor and the necessitous, and that we ought to go no further. Sir, the soldiers of the revolution have a claim of right upon us, and I would do equal and ample justice to all, and not mete it out with a stinted and partial hand. I would not make the payment of our debts to depend upon the poverty of our creditors. No, sir, I would not say to the heroes who fought our battles, and, in the dark hour of our adversity, wrought out our political salvation, and to whom we delivered only tattered rags, and called them, in mockery, payment for their services; men, whose disinterested achievements are not transcended in all the annals of chivalry, and who, for us, confronted horrors not surpassed in all the histories of all the martyrs—to these men, of honor most cherished, and sentiments most exalted—our fathers, the authors of our being—I would not now say, come before us in the garb of mendicants; bow your proud spirits in the dust; tear open the wounds of the heart, which you have concealed from every eye, and expose your nakedness to a cold, unfeeling world, and put all upon record, as a perpetual memorial of your country's ingratitude; and then, we will bestow a pittance in charity! You talk of erecting statues, and marble memorials of the Father of his country. It is well. But could his spirit now be heard within these walls,

would it not tell you, that, to answer his fervent prayers, and verify his confident predictions of your gratitude to his companions in arms, would be a sweeter incense, a more grateful homage to his memory, than the most splendid mausoleum? You gave hundreds of thousands of dollars to La Fayette. It was well; and the whole country resounded, amen. But is not the citizen-soldier, who fought by his side, who devoted every thing to your service, and has been deprived of his promised reward, equally entitled, I will not say, to your liberality, but to your justice?

Sir, the present provision for the soldiers of the revolution is not sufficient. Even the act of 1818 was less comprehensive than it ought to have been. It should have embraced all, without any discrimination, except of services. But that act, partly by subsequent laws, and partly by illiberal rules of construction, has been narrowed far within its original scope. I am constrained to say, that, in the practical execution of these laws, the whole beneficent spirit of our institutions seem to have been reversed. Instead of presuming every man to be upright and true, until the contrary appears, every applicant seems to be presupposed to be false and perjured. Instead of bestowing these hard-earned rewards with alacrity, they appear to have been refused, or yielded with reluctance; and to send away the war-worn veteran, bowed down with the infirmities of age, empty from your door, seems to have been deemed an act of merit. So rigid has been the construction and application of the existing law, that cases most strictly within its provisions, of meritorious service and abject poverty, have been excluded from its benefits. Yet gentlemen tell us, that this law, so administered, is too liberal; that it goes too far, and they would repeal it. They would take back even the little which they have given! And is this possible? Look abroad upon this wide extended land, upon its wealth, its happiness, its hopes; and then turn to the aged soldier, who gave you all, and see him descend in neglect and poverty to the tomb!

The time is short. A few years and these remnants of a former age will no longer be seen. Then we shall indulge unavailing regrets for our present apathy: for, how can the ingenuous mind look upon the grave of an injured benefactor? How poignant the reflection, that the time for reparation and atonement has gone forever! In what bitterness of soul shall we look back upon the infatuation which shall have cast aside an opportunity, which never can return, to give peace to our consciences! We shall then endeavor to stifle our convictions, by empty honors to their bones. We shall raise high the monument, and trumpet loud their deeds, but it will be all in vain. It cannot warm the hearts which shall have sunk cold and comfortless to the earth. This is no illusion. How often do we see, in our public Gazettes, a pompous display of honors to the memory of some veteran patriot, who was suffered to linger out his latter days in unregarded penury!

“How proud we can press to the funeral array  
Of him whom we shunn'd in his sickness and sorrow;  
And bailiffs may seize his last blanket to-day,  
Whose pall shall be borne up by heroes to-morrow.”

We are profuse in our expressions of gratitude to the soldiers of the revolution. We can speak long and loud in their praise, but when asked to bestow something substantial upon them, we hesitate and palter. To them we owe every thing, even the soil which we tread, and the air of freedom which we breathe. Let us not turn them houseless from habitations which they have erected, and refuse them even a pittance from the exuberant fruits of their own labors.



# SPEECH OF EDWARD LIVINGSTON,

ON A

BILL FOR THE RELIEF OF THE SURVIVING OFFICERS OF  
THE ARMY OF THE REVOLUTION,

DELIVERED IN THE HOUSE OF REPRESENTATIVES OF THE UNITED  
STATES, JANUARY 15, 1827.



MR. CHAIRMAN,

HAVING very fully expressed my opinion on this bill, at the last session, it is not my intention again to go over the ground which was then occupied: it is the amendment alone which forces me to trouble the House.\* I shall vote against it. And, as that vote may seem to be at variance with opinions I have expressed, it becomes necessary to show that there is no variance between them. At the last session, I gave my professional opinion in exact accordance with that which has, with so much precision, and with the force of eloquence which truth and conviction can alone inspire, been urged by the member from Massachusetts, (Mr. Webster,) that the demand of the petitioners was one that, if the United States could be brought to answer in a court of equity, would entitle the petitioners to recover; this opinion was the result of the closest attention to the circumstances of the case. The United States, in the year 1780, without the means to discharge the arrearages, or even the current pay of their army; without even the ability of affording them clothing or subsistence, made an offer, sanctioned by all the solemnities of a legislative act, to those officers, then subsisting on their own means, providing their own

\* Mr. Wickliffe had moved an amendment to the bill, which went to include the heirs and representatives of deceased officers in the provisions of the bill.

clothing, horses and arms, that, if they would continue in the service until the end of the war, that is to say, if they would conduct it to an honorable and successful issue, their arrears of pay should be discharged; and that, to indemnify them for the privation they had suffered, for the dangers they had encountered, and were still to meet, for the sacrifice of professions, of business, of capital, and of all the means they might otherwise have had of securing a competence for the rest of their lives, that ease (not affluence,) should be secured by half pay during the remnant of their lives, to those that should escape the dangers, and resist the hardships of the service. The officers, those, at least, who are the objects of this bill, accepted the offer, and concluded an agreement, of which all the conditions were most favorable to the public and onerous upon the officers; they took upon themselves the risk of the event.

From the circumstances of the case, it could not, for the most part, be otherwise; if the issue of the contest should be unfavorable, they could hope for nothing; but they took another risk which the circumstances did not impose; if they fell in the contest, if it should be prolonged to a period that should leave so short a probable life for them, if they survived, as to make the life annuity of little value, in either of these cases, although the issue of the contest should be successful, no equivalent would be received. Yet the officers accepted the offer, disadvantageous as it was; their motives were higher than any mercenary prospect of profit; they sacrificed their private pursuits; they spent their private fortunes; they abandoned their families and friends; they suffered the privations incident to a service in which there were no regular supplies of the first necessities of life; they encountered the dangers of a sanguinary conflict, and of an ignominious death, should it prove an unsuccessful one. Under all these disadvantages, they brought your army into a state of discipline that placed it on a level with the first troops of Europe, with

whom they were placed as enemies or allies; they suffered, they fought, they bled, they conquered. Peace returned—independence was secured. They nobly, fully and effectually performed their contract—but did the country perform hers? It cannot be pretended that she did. And I admit, in some sort, the plea of necessity on which the failure is justified. There was, in fact, no government, or one so feeble as scarcely to deserve the name; but, although necessity might justify a delay in the performance, it is no plea for an act of bad faith. The little power the government possessed was sufficient to impose an injurious alteration in the terms of the contract, although it had not the force nor the means to perform it. This is a stain on the faith of the country, that can only be removed by the speediest, the most ample compensation. The charge should not be lightly made. The proofs should be adduced; unhappily for the honor of the country, they are but too convincing. The offer of the life annuity was made individually to every officer who should accept and perform the terms. From its nature, the compensation must be more valuable to some than to others; to those advanced in life, a commutation would be more acceptable than to the young. Circumstances might make a sum in gross more desirable than the annuity. At any rate, the consent of each individual was necessary, before he could be bound by any change in the terms of the contract, yet because some officers had signified a desire to have the annuity commuted for a sum equal to full pay for five years, the government directed that the voice of a majority of the officers in each line should bind the whole, and that the officers of such lines as agreed, should receive the amount in money, or securities at six *per cent.* instead of the half pay: and a majority of the lines of ten states only having declared in favor of the commutation, certificates were made out by the paymaster-general for each officer, stating the sum that would be due on such commutation, and these, without any security, without any offer of money as an alternative, were offered to each one entitled to the



half pay whether he had agreed to renounce it or not. No provision was made for the half pay, and the officer was to take this or nothing. Putting gratitude for the exalted merits of the army, and their inestimable services, out of the question, was this a compliance with the contract for half pay? What would be decided between two individuals standing in these relations to each other, if we could suppose a state of society in which the creditor should have no right to coerce his debtor? Could any court of equity declare that the acceptance of the certificate was a discharge of the contract, when the debtor possessed the power of telling his starving creditor—take what I offer or receive nothing? Common sense and common justice are outraged by supposing there can be a doubt. The first contract then for half pay for life, was shamelessly broken. Another piece of open injustice in this transaction is also worthy of remark. The officers, who were deranged from the several lines, in the year 1780, were also entitled to their half pay from that period; yet, in the year 1783, they were, by the resolve of commutation, expressly required to abandon the three years' annuity then due to them, and were to receive, in lieu of that and the half pay for the rest of their lives, the commutation of five years. Thus in effect giving them only three years and a half full pay; and they, too, were individually to be bound by the vote of the officers of the state in which they lived. But whether that was ever given in any one case does not appear.

But, after this first breach, was the second contract better kept? The promise of half-pay by the resolution, was to be discharged by five years' full pay, in money, or security bearing an interest at six *per cent.* What was given? Paper, without security; worthless paper, snatched from the hands of the starving officer, for a morsel of bread. But the excuse still is necessity, hard necessity, which has no law! Admit its force, it can excuse only while the necessity continues. If, in 1783, the confederation had nothing but rags in its treasury, it must pay in rags: but, when the present constitution was established, was justice then

done? No. The speculating holder of the certificate, who had bought it for one tenth of its nominal value, received six times as much as he gave for it; and the few veterans who had retained the evidence of their country's faith, received only three fourths of the amount; and this is called a compliance with our contract! If our fathers were unable to pay the purchase of our liberty, we are amply able: the inheritance, the rich, invaluable inheritance, is in our hands; we are enjoying it in peace. Shall we refuse to pay the slight incumbrance with which it is charged, in favor of those who purchased it for us, at the expense of toil and danger? The plea of necessity will not serve us! We have the means to pay this sacred debt: the will, if we prize the honor of our country, should not be wanting. It may be asked, and this was the principal motive for my troubling the House, how, considering, as I do, this debt as one vested in the officers at the close of the revolutionary war, I can oppose this amendment, which is intended to include the representatives of such as have died since that time? If it was a debt, it became the property of the representatives when the principal died? Sir, I think it did; and, if this amendment would give any thing like compensation to those representatives, I should vote for it: but its effect has been shown. The sum contemplated to be given by the first clause of this bill, would be a mockery, not a relief to the distress to which it is applied; if, instead of the million, a sum sufficient to the full payment of the debt were inserted, I should vote for the amendment; convinced that, in doing so, I was performing, not an act of bounty, but of strict justice—justice to which we might be compelled, if we were amenable to the jurisdiction of our courts. And I should not fear the charge of inattention to the public interest, if five, if ten millions were added to our debt, should they be required for the payment of this most holy of all obligations. But, sir, I have another reason for rejecting this amendment. The bill does not go on the principle of the



discharge of a debt; the sum is not one half of what we owe to those survivors for whose relief it is intended. Although I think we owe a legal debt, there are others, who, without acknowledging that claim, think that the survivors of that brave and virtuous band, who achieved our independence, ought not to pass in want the evening of that life, the morning of which was devoted to our service, and the meridian wasted in expectation of our justice. In this I coincide with them. The sum, proposed by the bill, will give some relief, if divided among the survivors; dribbled out between them and the heirs of their deceased brethren, it will be of use to none. But there are other honorable members who can acknowledge no claim, if addressed only to our gratitude, who will give nothing that strict justice does not demand; and who think that the constitution ties up our hands, from opening at the call of national honor or gratitude. Our feelings are not to be indulged; no argument is to be addressed to this House, that is calculated to excite them, however pure, however exalted, however coincident with public interest and national honor. Sir, I abjure this doctrine of a pathetic duty; it is not true; it is not well founded; in politics, as in morals, it is a heresy. The natural impulses of the mind were given to us by the God of nature, for the noblest purposes. In public as in private life, good feelings ought to be indulged; we sin against the God who gave them, when we refuse to listen to their voice; it is our duty to yield to their force, and to use all our faculties to impress them upon others. But, are there no bounds? Are we to exhaust the treasury to gratify our feelings of compassion, or bestow our bounty indiscriminately, to relieve distress? Yes, there are bounds, clearly defined, strongly marked, which duty cannot pass. In our situation, these bounds are, on one side, the constitution; on the other, the interference with more important constitutional objects; between these, we may give a free scope to feelings of compassion, honor, national pride, and



generosity, without any fear that we shall be misled. We cannot provide for the poor of the different states, however deeply we may feel for their distresses, because we have no constitutional power to indulge this feeling of compassion; and, however we may be impressed with sentiments of gratitude for great public services, we cannot reward them at the expense of others, who have claims on our justice. But, when we have the means, without infringing on any better or equal claim, or on a just regard for future demands, and where we have the constitutional power, I say, listen to the high feelings with which you are endowed; they sing no syren song; they will lead to private happiness and public glory. But, the constitution, we are told, gives us authority for this act, considering it as an act of bounty. The constitution has made us a nation, but does not, and could not, define every act, which, in its national capacity, the general government was authorized to perform. This, however, we assert, without fear of contradiction, because it is expressly provided, that all powers necessary for the exercise of those that are specifically given, are vested in Congress. Now, what more necessary for the general defence, one of those specific powers, than to reward those who have defended you? Let us be consistent: before we say, that all expenditures, not expressly authorized, are unconstitutional, let us see how many such expenditures we are in the daily habit of making, with regard to ourselves, without inquiry, and without scruple.

In what clause of the constitution is the authority given to supply stationary for our individual use? Where does it allow the franking of our letters? It declares that we shall fix our compensation, which we have done, and these appendant conveniences are added without scruple. When the dispensation of Providence deprives us of a member, whence is derived the authority to pay for his funeral obsequies at the public expense; to erect a tomb to his memory, and to provide the badge of mourning, which we now unfortu-

nately wear; to lose the services of both branches of the legislature for two days, to indulge our grief for his loss? You were told that a venerable servant of the public, who filled the first office in the country, ought to have had the hand withered, that signed the approval of an act of humanity which, in our national capacity, we owed to the inhabitants of a neighboring country, suffering under one of the most awful dispensations of Divine Providence; because, (I suppose,) it is not written in the constitution, that, as a sovereign power, the United States shall be bound by that public law which imposes the duties of benevolence on nations as on individuals. If so, how, without a fear of the same curse, can we bear on our arms the *insignia* of mourning, which, without constitution, or law either, have been paid for out of the public treasury? Sir, the recompense to the officers is liable to no such objection: it is, as I have shown, authorized by the plain meaning of the constitution. The honors, paid to deceased statesmen or heroes, the honorary rewards that you bestow upon them when living, the tombs and statues you erect to their memories after death, and the provision which you ought to make to protect their declining years from poverty, are wise, constitutional, and noble acts; while they reward for the past, they incite for the future; and a nation would present a strange spectacle, that had precluded itself from the exercise of this great and indispensable duty.

It is, therefore, that I differ from the honorable gentleman from Massachusetts, (Mr. Everett,) who says, no sympathy ought to be felt for the children of the deceased officers, who may be in want. They have not served us, it is true; but their fathers, who did, are beyond the reach of our gratitude, and the transfer of the feeling is natural and just. Public benefits bestowed on the children of the deceased father, encourages him who is alive, in the discharge of his duty, by the purest of all motives—paternal affection; and that legislation must be unwise, indeed, that fails to enlist in support of the state, all the best impulses of

humanity. Let that republic get on as it can, where the veteran, blind, maimed and poor, like Belisarius, is forced to apply to public charity for support ! Let that republic get on as it can, where contracts are broken, and public beneficence refused ; where nothing is given but what is in the bond—and that is frequently refused ! Let that republic get on as it can ! It will never produce any thing great ; its career will be short and inglorious ; its fall certain, and unpitied ; its history remembered as a warning, not an example ; and the names of its legislators and statesmen, buried in the oblivion to which their false economy tends to consign the memory of those who have established its freedom, or defended it from aggression. May ours show, by its decision on this bill, that it has a higher destiny, and that it is guarded as well by liberality and honor, as by justice !



## SPEECH OF JAMES BARBOUR.

ON

A BILL FOR ABOLISHING IMPRISONMENT FOR DEBT,

DELIVERED IN THE SENATE OF THE UNITED STATES,  
FEBRUARY 17, 1824.



MR. PRESIDENT,

IT has been remarked by lord Coke, that he never knew a wise measure, however inauspicious the beginning, introduced into parliament, that did not eventually succeed. A remark of this kind, from so profound an observer of the course of public affairs, offers great encouragement to the reformer of abuses. He will contend patiently, but perseveringly, with existing prejudices, animated by the assurance that his labors, in a good cause, will not be exerted, finally, in vain. In confirmation of this remark, I will refer to the history of this district. It was only two years past, that I could carry through this body, and with great difficulty too, a bill to change the law in force here concerning insolvent debtors. For, wonderful as it may seem, it was no less true, that, while the law enabled the inhabitants to avail themselves, after a few days confinement, of the privilege growing out of their condition, to the stranger, who had been pursued hither by some cunning and unfeeling creditor, the privilege was denied, till he should have suffered imprisonment for twelve months. About this time, too, I have been informed, the bounds were curtailed, and many instances occurred, in consequence of their limited extent, of the inhabitants of the place being separated from their families, who depended for their daily bread on the labor of the prisoners, and who, by such curtailment, were prevented from profiting by

a demand for labor, as it was to be performed beyond the bounds; but, subsequent to the discussion in this body on the subject, the court has enlarged the jail bounds commensurate with the extent of the county. But this is not all. The public mind, throughout the union, has been drawn to this subject. It has made its way into the halls of the state legislatures. In some few instances, imprisonment for debt has been already abolished, and it is to be hoped, and confidently anticipated, that everywhere this stain on our statute book will be effaced; that the doors of every jail will be thrown open, and the captive set free.

Although all are aware that we have no right to interfere with the regulations of the states, and although it may be admitted that the prisoners for debt, under the process of the United States' courts, are comparatively few, yet the example established by us cannot be without a salutary effect. The theory of the constitution supposes that the counsels of this body will be directed alike by wisdom and experience. The mode of selection, and the age of the elected, are the best guarantees that the infirmity of our nature admits, that nothing rash will be attempted here; that the consequences of a measure will be duly weighed, and nothing adopted but what has the sanction of the judgment, enlightened by the suggestions of experience; and hence the importance of your decision on this question.

Let us, then, inquire what the question is. At this stage of the inquiry, the senate will not suffer themselves to be embarrassed by the details of the bill. Whether it shall be prospective or retrospective; whether the provisions are sufficiently guarded, in reference to fraudulent debtors, will be the subject of future inquiry and arrangement, when the principle shall have been fully discussed and settled. Thus qualified, the question now presented for decision, is simply this—Is it right to punish, by imprisonment, the honest but insolvent debtor?

I grant you the power, but I deny you the moral right. I do not mean to encumber the discussion with any constitutional question. High as the constitution is, I appeal to an authority still higher—to the patent held by man directly from his God, by which his liberty, and the right to its enjoyment was guaranteed. It existed before constitutions or societies themselves. The image impressed upon him at his birth was the sign of the covenant, and should have been the shield against its violation. Its preservation was the great object of the social compact. In our institutions it was so proclaimed. Every portion of our natural rights is retained, except so far as the welfare of the whole requires a sacrifice, and hence I assume it as an axiom, that the liberty of the citizen is never forfeited to society but by a voluntary act of the offender, or where its abuse has become, or threatens to become, dangerous to the public peace. Beyond these limits, every infraction of this precious gift is usurpation; an act of power without right, than which nothing is more odious. If this be true, it may be justly contended that crime, or the probability of its commission, should precede a punishment which involves imprisonment. If, then, punishment presupposes crime, the advocates of imprisonment for debt must be ready to contend that insolvency is a crime. Now, although it has grown into an adage that poverty is a misfortune, the truth of which I can confirm from actual experience, yet it is a part of the same adage that it is no crime. Mark the inconsistency in which your policy involves you! The liberty of the citizen is so far protected by the constitution as to be placed beyond his own control. If a being, goaded by hunger and distress, or any other necessity, were base enough, like the Egyptians of old, to surrender his liberty to another, no matter how solemn the covenant, or how weighty the consideration, it is instantly cancelled by the spirit of the constitution. Yet, without a covenant, or without a crime, you give up the unfortunate to the will of the creditor, and lend him your authority to deprive a fellow-being of his liberty. That which



you will not permit directly, you sanction as a consequence. Who is able to reconcile this contradiction? It is perfectly consistent with fair argument to arrive at the error of a principle through its pernicious consequences. The immediate effect of the existing policy is to confound all distinction between the innocent and the guilty, the man of misfortune and the man of crime. If insolvency was exclusively the result of imprudence, there might be some apology for the cruelty with which the debtor is treated. But, amongst the number, how many have been the sport of events against which no human foresight could guard. Do we not know, from our own observation, that the most industrious and the most prudent are not unfrequently involved in this calamity. Who, among ourselves, can arrogantly claim an exemption from misfortune? Our lives and our substance are both held by that frail tenure which belongs to all earthly things. The proud and foolish man, surveying his vast possessions, may exclaim, soul, take thy rest! but the echo to his boast is the awful denunciation, dust thou art, and unto dust shalt thou return; or the elements have commission to destroy, and the winds, the fire, or the flood, in an instant prostrates his earthly hopes. In these dispensations of an inscrutable Providence, to which all are alike subject, but from which, for the present, we may be happily exempt, let us be taught the necessity of bearing with humility our prosperity; but let not that exemption steel our hearts against the unfortunate—their cup of life is made sufficiently bitter by their misfortunes. 'Tis cruelty alone that will administer an additional drug. And yet these victims of misfortune are the subjects of your punishment.

What, let me ask, is the legitimate object of punishments? The reformation of the offender, or to restrain him from violence? Reform the prisoner? In what? Does any man desire to become insolvent? If there be any one thing about which all mankind agree, it is in the wish to better his condition. This wish is implanted in our nature, and grows with our growth.

Can you increase it by punishment? Or can it be necessary for the peace of society to restrain of his liberty the man whose only crime is his misfortune?

How are these weighty considerations, against the existing policy, met by its friends? It is urged, by them, that the evil complained of has been exaggerated; that the sufferers are but few; that the moral sense of mankind revolts at the imprisonment of an honest debtor. Is this so? Then there is an end of the question. You can have no difficulty in changing a system so unjust and so cruel, that none are found wicked enough to carry it into execution. Why disgrace your statute book with such a law? It is but an evidence of your insensibility to the character of your code. But, unfortunately for the gentleman who thus argued, the moral sense of mankind is not what he supposes. Let us look at facts. Take the document, exhibited yesterday by my honorable friend from Kentucky, (Mr. Johnson)—it is the record of the jail in Boston, the metropolis of the very state whose representative on this floor reposes on the moral sense of mankind, as a sufficient shield against any abuse under the existing law. In recurring to this document, I intend nothing that is invidious; I presume Boston is not more remarkable for the number of its insolvent debtors, or the severity of creditors, than any other part of the United States. Indeed, a member from New York, at the last session, exhibited a similar document from the jails of New York. Taking this document as the rule by which to estimate the number of sufferers in the United States, what a picture of human misery does it exhibit! In a population of forty thousand, the number of souls in Boston, there were committed, in 1820, one thousand, four hundred and forty-two; in 1821, one thousand, two hundred and eighty-one; and in the first three quarters of 1823, seven hundred and sixty-nine; making a proportion of one thirtieth of the whole population, which has suffered imprisonment for debt; and among this number, in the whole time, four hundred

and thirty females. This, then, is a specimen of the moral sense of the people of Boston, and, as I have assumed, of the United States. By which rule, after every reasonable deduction for the difference between populous towns and the country, it may be safely affirmed, that ten thousand human beings are annually incarcerated for debt in the United States. When we add to this the wives and children of the sufferers; if our sympathy is to be thus limited to the exclusion of more distant relatives, we may fairly conclude, that sixty thousand people are annually involved, directly and indirectly, in the mischief resulting from this barbarous policy. If the scope of the evil, then, has been exaggerated, it cannot be from a misrepresentation of the number of the sufferers. Is it in the extent of their sufferings? Where is the barometer by which these can be weighed? Has the senator from Massachusetts, or any of you, visited these abodes of wretchedness, whose silence is interrupted only by the sighs and groans of the victims; or, peradventure, by the aspiration of some broken heart, penetrating with the eye of hope the dark cloud that surrounds human things, and looking to a better world, "where the wicked cease from troubling, and the weary are at rest?" Of these dreary abodes, it may well be said, as of the grave—

Darkness, death and long despair,  
Reign in eternal silence there.

The sensibility of mankind is a subject of curious speculation. Let some ideal case of misfortune be touched by the hand of a master—some great unknown—although the theatre of suffering be the *Ultima Thule* of the habitable globe, and although centuries have intervened, yet every page will be bedewed with the sympathetic tear—while we hear, without emotion, of the real sufferings of thousands, if perchance they are our immediate neighbors and cotemporaries.



What flight of fancy, what power of description, could add a shade to the dark picture of human affliction, exhibited in this already alluded to document? A husband and a father is snatched from his family at the moment when the wife is suffering and in peril, and that very situation the cause of the arrest, with a view to practise on the humanity of others! Yes! torn from a wife and nine children, dependent for their existence on the daily labor of the debtor. The creditor is conjured to relax his rigor. Shylock-like, he turns a deaf ear to the supplication; the wife falls a victim, the children live on charity. But, atrocious as is this case, it yields in enormity to another, where a widowed mother is imprisoned by a brutal creditor, as an obstacle to his detestable purposes against an unprotected daughter. But for cases so singularly marked by unmixed cruelty and villany, we should have had ample occasion to dwell on other instances alluded to in the document. Take, however, one more; it is that, where a man, in a state conterminous to Massachusetts, was confined thirty years. So long had been his interment in jail, that he was forgotten by all his cotemporaries. When discharged, as he was, finally, by the humanity of others, the expenses of his confinement were three thousand dollars.

Among the victims, we are told, there were four hundred and thirty females. There is something, sir, so exquisitely horrible in contemplating such a mass of female wretchedness, that I have no language in which to give utterance to my feelings. Opposed, as I am in principle, to the imprisonment of a man for debt, I am a hundred-fold so in regard to a woman. The distribution of civil rights between the sexes, gives all to the one and nothing to the other. Where privileges are concerned, the woman is scarcely considered as a sentient being; she is quickened into life, and an independent existence acknowledged, only when she is to become the subject of imprisonment, of penalties and of pains.

Now, sir, let it be admitted, that, among this num-

ber of females, a proportion, and a large one if you will, are the victims of vice. It is not charitable to suppose all are so. Take from the group the widow of some honest mechanic, worthy and virtuous—for these qualities belong alike to every condition—as often found in the cottage as in the palace—whose husband, when alive, brought the avails of his daily labor to his humble roof, where his wife performed her every duty; “on her tongue is the law of kindness—her children rise up and call her blessed—her husband also, and praiseth her;” but he is snatched from her by the hand of death. Thus bereaved, she resorts to her scanty means to feed and clothe her little ones. She redoubles her efforts—she wastes her strength over the midnight lamp, “and, with untasted food, supplies her care.” But all will not do. The cruel creditor comes—she is unable to pay—the jail is her portion. The grave is her only refuge from calamity, given in the mercy of God to the sons and daughters of affliction. Her children, naked and hungry, beg the bread of life.

Equally subject to this deplorable fate are your patriots and your heroes, men who have guided your counsels by their wisdom, or conducted your armies to victory; men who have consecrated the liberty you enjoy by their blood, and whose very sacrifices for the country have been the sole cause of their penniless condition. These, too, find their career terminate in a jail; and, while their ears are greeted with hosannas to freedom—a freedom which they in part achieved—their portion is a loathsome captivity. Gloomy and dark as this picture is, think it not the mere offspring of a heated and unchastened imagination. The facts before you, as well as those mentioned by my friend from Kentucky, as coming within his own knowledge, have lost a portion of their sombre character in the description. And is this your boasted land of liberty, where enormities like these are committed in the name of the law! Sir, there is a consideration presents itself here, far beyond the interest of



creditor or debtor. The policy of free governments should, by every means, cherish among the people the liveliest regard for the liberty of the citizen. Whatsoever is common, either in the physical or moral world, ceases to be striking. From the unnumbered victims of the policy I am denouncing, the impression on the mind, when a fellow-being is led to captivity, is as feeble as that produced by the rising or the setting sun; the sense of public feeling becomes blunted, and the loss of liberty is classed among your every day occurrences. The essence of liberty consists in the consciousness of its possessor, that, if he be not criminal, it is surrounded by an unapproachable inviolability. Held at the nod of a worm like ourselves, (if it be not profanation to call a thing thus held, liberty,) it becomes valueless and contemptible. In confirmation of the sentiment that liberty itself, in the eye of mankind, is depreciated by the frequency of its violation, let us refer to our formerly bloody criminal code. We saw death itself, as a capital punishment, from its indiscriminate infliction, and from its daily occurrence, lose its terrors. Since, however, wisdom and humanity have united in graduating a just scale of punishments and crimes, that of death, from its rare occurrence, strikes the mind as an impressive and awful spectacle.

Let, then, the liberty of the citizen, like his life, be preserved from daily and wanton violation—its value will increase in the estimation of the people, and its loss strike with little less effect than the loss of life itself.

Let us next inquire, if the mass of suffering which I have shown to you to exist, be the unalterable condition of our kind, is it a sacrifice to which poor human nature must submit? Is it a lesser evil compensated by a greater good? I call upon the friends of the existing policy to answer these questions. They reply, it is to enforce the recovery of debts. Of whom? Not of him who is to be protected by this bill; for it is only the honest debtor, who has faithfully surrendered the last vestige of his property to his creditor, who



can profit by its provisions. The fraudulent debtor is placed in a worse situation; close jail, deprived of his bounds, is his doom, by the bill. If this be not sufficient, in due time, propose other and severer enactments. I will go all lengths to punish him. But, if you hold not to bail, the fraudulent will escape. What doctrine is this? You are to punish, indiscriminately, lest the guilty should escape. How long has this been the principle of legislation? We are taught, from the highest of all possible authority, that nine guilty men should escape rather than that one innocent should suffer. The rule, it seems, is now to be reversed. But it is urged that an honest debtor would have no difficulty in giving bail. Indeed! I fear the gentleman is calculating fallaciously again, on the moral sense, or, if you please, the friendship of mankind. Friendship, or rather its professions, are too often tendered where they are not wanting—to wealth, rarely to distress. They are the blossoms of the sunshine, but wither in the adverse blast. For,

“ What is friendship but a name,  
A charm that lulls to sleep;  
A shade, that follows wealth or fame,  
And leaves the wretch to weep ?”

But let all this pass for nothing. Let it be granted that the world has been regenerated; that those who were not the world's friends formerly, have become so by some prodigy, no matter what—still I demand to know, whence do you derive the right to throw a freeman on the courtesy of a friend; to save him from imprisonment, on the mere suggestion of another that he is in debt? In all criminal cases, no matter how atrocious may be the crime with which the accused is charged, he is presumed innocent, till the contrary appears; and that too by testimony, on oath, of credible and disinterested witnesses. Of him you never require bail, till a presumption of guilt is made satisfactorily to appear. But charge a man with debt—even by an interested party—you presume him guilty—that his

purposes are fraudulent, and deprive him of his liberty, if he does not instantly give sponsors for the delivery of his body into court! Now, let us imagine that it was proposed to remove the ramparts which the wisdom of our ancestors has erected for the security of our innocence, by enacting that, on a mere accusation of crime, without testimony, a citizen might be arrested—could you listen, with patience, to the suggestion, that it ought to be adopted, lest the guilty should escape? I am persuaded you would cry out, with one voice, let ninety and nine guilty men escape, rather than that one innocent man should thus suffer. But waive, if you please, this consideration. Let us be insensible to the wanton violation of the liberty of the citizen—let us steel ourselves against the suffering of the captive—let us harden our hearts against the violation of decorum, in consigning to the same cell men and women, and mixing with both the atrocious malefactor—let all these things, for the moment, be forgotten, and discuss the question as one of dollars and cents. How will the account stand? Referring to the document already alluded to, it appears, in two thousand and eighty-four cases, the costs of commitment exceeded the principal; and these paid by the creditor. Add to this the loss of labor to society, by the confinement of the debtors, and compare this amount to that which the creditor receives, by this mode of punishment. One case in a thousand, perhaps, is productive of some benefit to the creditor—and that, generally, the result of the generosity of others. And should this exception lessen our abhorrence for the policy? Some swindling adventurer may find his account in pampering the prodigality of a wayward son, in the calculation of reaching, through the imprisonment of the child, the sensibilities of the father. Friendship may sometimes be burdened, in the release of an unfortunate friend. But are these calculations worthy of your protection? Is it right to arm villany with an instrument, by which to torture the best feelings of the human heart? Sir, I have no



hesitation in saying that, could a balance be struck, with an exclusive eye to the creditor, of profit and loss, notwithstanding his power over the debtor's body, and the myriad of instances in which it has been exercised, that he himself has been greatly loser—disregarding, entirely, the sufferings of the imprisoned, as well as the infinite injury to society. And here, sir, I would hazard a general remark. It may be advanced, as an unquestionable truth, that crimes are multiplied in every community where the infamy attending their perpetration is lessened, by the circumstance that their punishment is common to misfortune as well as to guilt. For example; if it was a fundamental principle, in your code, that no man should be deprived of his liberty but for crimes, in which I class fraud, public opinion would, at once, associate guilt with imprisonment; and, as a consequence, many who now might be disposed to defraud their creditors, from the hope of escaping, unnoticed, among the honest and unfortunate, would then, from the fear of being singled out to abide, alone, the infamy of their condition, find a sufficient motive to abstain from executing their fraudulent designs.

If there be any force in these views, I have already met the other objection urged against the principle of the bill—its tendency to diminish credit. Sir, I do not mean, because it is unnecessary, to enter, at all, into the much contested question—as to the influence of an extensive credit on the interests of society. I have removed all the difficulty, growing out of this view of the subject, by showing that the creditor himself will profit by depriving him of a power, which, in its practical effects, has been to him productive of loss. One remark, however, I will hazard, on the general subject; and that is, that the legitimate objects of confidence or credit, are, the integrity of the debtor, or his competency to pay, or both: and that, if a creditor be not content with these, and extends his calculation to the body of his debtor, he deserves any thing but our pro-



tection. Although there may be cases of this kind, and the existence of which I have already admitted, no instance is avowed in modern times, except that to which my classical hearers will readily refer, where, in the face of the bond, the flesh was pledged as the guarantee to punctuality. The universal reprobation of mankind, bestowed on this case, supposed to exist only in the poet's imagination, is due, in nearly the same degree, to him who, though not avowedly, yet secretly looks to a security little less horrible—the captivity of his debtor.

The mischief, of which I complain, is the undisputed progeny of a barbarous age. It is antiquity only that shelters it from reprobation. And, were it now for the first time proposed, it would be everywhere received with marked disapprobation.

But there is a species of idolatry common to all mankind. It is not in religion only that it is manifested; it displays itself on a variety of occasions; and in none more conspicuously than in clinging to ancient practices. We read now, indeed, with horror, of the treatment of the debtor in the best days of the Roman republic. There, the insolvent debtor's body was cut up, as you now do the carcass of an ox, and a part was given to the creditor, proportional to his demand. As a supposed mitigation to this barbarous practice, the debtor, his wife and children, were sold into bondage, and the avails distributed among the creditors. We read now of those things with horror, partly because these abominations have long since ceased to exist. But had they still prevailed, especially in England, they would have lost, in our eyes, half their atrocity. I feel justified in so saying, when I refer to punishments in criminal cases, even now inflicted in many parts of the United States, though not so enormously disproportionate to the offence, yet so repugnant to humanity, that they never could be retained, but for the example of our ancestors. That to this example we are indebted for the remaining fragment of this

barbarous policy, I am persuaded none will deny. I at the same time admit, that many grains of allowance are due to us. Those, who usually legislate for us, are generally disciples of Mr. Justice Blackstone; whose opinions on municipal law, from their youth, they were taught to consider as infallible. He, it is well known, is the encomiast of whatever prevails in England. And why should he not? He was of the favored few who fed liberally on the bounty of his country, which has a wonderful tendency to reconcile one to the existing state of things. Now, for myself, however arrogant it may seem, I must be permitted to say, that the time has long past by, when I implicitly adopted opinions on the authority of a name. Experience has taught me the necessity of judging for myself; as I have often found very serious heresies sheltered by the fame of their authors; and the truth has been irresistibly forced upon me, that a great man inverts the general law of optics, by looming most advantageously at a distance. On the policy of England, as to imprisonment for debt, Blackstone indulges in his usual complimentary style. But the courtier is bad authority on the abuses of government. Let us ascertain the policy he thus commends, and judge for ourselves. There, the debtors are confined without any limitation as to time. Both sexes, not unfrequently, promiscuously huddled together, presenting a scene of whatever is loathsome and abominable to the eye of a beholder—twenty thousand of whom are supposed to fall, annually, a sacrifice to this barbarous practice. But, notwithstanding this waste of human life, the jails continue to fill to overflowing, when, from necessity, an act of general jail delivery is passed by parliament, by which the wretched survivors, squalid with filth, and corrupted by communion, are again thrown on the lap of society—fit and ruthless instruments of vengeance, in the hands of retributive justice, to chastise that society from which they have endured such multiplied wrongs. I appeal, from the authority of the judge, to their own poet, who gives you a vivid portrait of these abodes

of wretchedness, in which he himself had been a sufferer :

“ Unpitied and unheard, where misery mourns,  
Where sickness pines, where thirst and hunger burn,  
And poor misfortune feels the lash of vice :  
While, in the land of liberty, the land  
Whose every street and public meeting glow  
With open freedom, little tyrants rag’d,  
Snatch’d the lean morsel from the starving mouth,  
Tore from cold wintry limbs the tatter’d weed ;  
Even robb’d them of the last of comforts, sleep ;  
The free-born Briton to the dungeon chain’d ;  
Or, as the lust of cruelty prevail’d,  
At pleasure marked him with inglorious stripes,  
And crush’d out lives, by secret, barb’rous ways,  
That, for their country, would have toil’d or bled.”

These are the fruits of that system which you have everywhere, with slight modifications, servilely copied in the United States, and which I now solicit you to abandon.

There is nothing in my nature, and, I may be permitted to add, in my situation, which would induce me to indulge in an adventurous scheme of legislation. But the age in which we live, demands that we fearlessly approach every evil, and boldly probe it to its source. Antiquity, of itself, is no longer sufficient to protect its errors. Our fathers thus reasoned, when they gave birth to our freedom and our free institutions.

The maxims of Europe should no longer be authority to us. In the career of political improvement, she is a sightless distance in the rear. Of the thousand instances to which reference might be had, in confirmation of this truth, take that of religious freedom.

It is held there as a sacred maxim, which it would be deemed impious to question, that a union between the state and the favored sect, is indispensable to the existence of the government and religion. In the most favored spot, a wretched toleration is all that is indulged ; while, in another portion, we are informed



their adorable king, whether with or without the direction of his holy allies we are not advised, is now seriously deliberating on the restoration of the Inquisition. Let us turn from a scene at which the heart sickens, to our own favored land, to do honor to the counsels of our fathers, while we are enjoying their beneficent results. Jefferson, a name forever dear to freedom, was the author, not only of the declaration of independence, but of unreserved equality to all religious sects. Animated by a holy zeal for the happiness of his species, and guided by the popularity of his own superior genius; to him the high privilege was given of exploring the hitherto untrodden path of political science. In the eyes of this great apostle of liberty, the hoary errors of Europe dwindled into contempt, and a dissolution between the church and state was the result of his efforts. Have the fears of the timid opponents of that measure been realized? No. The world has beheld, for the first time, the realization of that promise, whose charity announces the divinity of its origin. The partition wall between the Jew and the Gentile has, in very truth, been broken down. Instead of an insolent and hypocritical hierarchy, eating out the substance of the land, and looking down with contempt on the remainder of mankind, the messengers of the gospel here go out with the meekness and in the spirit of their Great Prototype, depending, and not in vain, on the voluntary aid of their followers, inculcating, with sincerity and zeal, the sublime truths of their religion, and practising what they preach. Here religion no longer seeks to erect its altars upon the ignorance of mankind, or propagate its doctrines by fire or the sword. Reason has been substituted for superstition—charity for persecution. Members of different creeds sit down together and participate at the same table of the awful mysteries of their religion; and everywhere we hear inculcated, from the metropolis to the wilderness, throughout all our borders, peace on earth, and good will to man. This is the fruit of the counsels of our fathers.

Go on, then, and complete the work they have so nobly begun. Let us erase from our code this barbarous relic, and whatever else is mischievous.

To us, in part, a great trust has been confided—the welfare of our country, and of generations yet to come. Nay, the world itself looks to us as to a great example, whence to draw the oracles of political truth. Fill, then, the measure which has been assigned you. Never tire till there is nothing to be done; and when you shall have reared a monument of beneficent legislation, if it be in the order of Providence that we, too, in our turn, shall be involved in the darkness of slavery and superstition, let us hope that our labors, though obscured for a season in the general gloom, may survive the eclipse, and become the guide of some future deliverer of his country.

# SPEECH OF HENRY CLAY,

ON

A BILL AUTHORIZING THE PRESIDENT OF THE UNITED STATES  
TO CAUSE CERTAIN SURVEYS AND ESTIMATES TO BE  
MADE ON THE SUBJECT OF ROADS AND CANALS;

DELIVERED IN THE HOUSE OF REPRESENTATIVES OF THE UNITED  
STATES, JANUARY 16, 1824.



MR. CHAIRMAN,

I CANNOT enter on the discussion of the subject before us, without first asking leave to express my thanks for the kindness of the committee, in so far accommodating me as to agree, unanimously, to adjourn its sitting to the present time, in order to afford me the opportunity of exhibiting my views; which, however, I fear I shall do very unacceptably. As a requital for this kindness, I will endeavor, as far as is practicable, to abbreviate what I have to present to your consideration. Yet, on a question of this extent and moment, there are so many topics which demand a deliberate examination, that, from the nature of the case, it will be impossible, I am afraid, to reduce the argument to any thing that the committee will consider a reasonable compass.

It is known to all who hear me, that there has now existed for several years a difference of opinion between the executive and legislative branches of this government, as to the nature and extent of certain powers conferred upon it by the constitution. Two successive Presidents have returned to Congress bills which had previously passed both Houses of that body, with a communication of the opinion, that Congress, under the constitution, possessed no power to enact such laws. High respect, personal and official, must be felt by all, as it is due, to those distinguished of-



ficers, and to their opinions, thus solemnly announced; and the most profound consideration belongs to our present chief magistrate, who has favored this House with a written argument, of great length and labor, consisting of not less than sixty or seventy pages, in support of his exposition of the constitution. From the magnitude of the interests involved in the question, all will readily concur, that, if the power is granted, and does really exist, it ought to be vindicated, upheld and maintained, that the country may derive the great benefits which may flow from its prudent exercise. If it has not been communicated to Congress, then all claim to it should be, at once, surrendered. It is a circumstance of peculiar regret to me, that one more competent than myself had not risen to support the course which the legislative department has heretofore felt itself bound to pursue on this great question. Of all the trusts which are created by human agency, that is the highest, most solemn, and most responsible, which involves the exercise of political power. Exerted when it has not been intrusted, the public functionary is guilty of usurpation. And his infidelity to the public good is not, perhaps, less culpable, when he neglects or refuses to exercise a power which has been fairly conveyed, to promote the public prosperity. If the power, which he thus forbears to exercise, can only be exerted by him—if no other public functionary can employ it, and the public good requires its exercise, his treachery is greatly aggravated. It is only in those cases where the object of the investment of power is the personal ease or aggrandizement of the public agent, that his forbearance to use it is praiseworthy, gracious, or magnanimous.

I was extremely happy to find, that, on many of the points of the argument of the honorable gentleman from Virginia, (Mr. Barbour,) there is entire concurrence between us, widely as we differ in our ultimate conclusions. On this occasion, (as on all others on which that gentleman obliges the House with an expression of his opinions,) he displayed great ability and

ingenuity; and, as well from the matter as from the respectful manner of his argument, it is deserving of the most thorough consideration. I am compelled to differ from that gentleman at the very threshold. He commenced by laying down as a general principle, that, in the distribution of powers among our federal and state governments, those which are of a municipal character are to be considered as appertaining to the state governments, and those which relate to external affairs, to the general government. If I may be allowed to throw the argument of the gentleman into the form of a syllogism, (a shape which I presume would be quite agreeable to him,) it amounts to this: municipal powers belong exclusively to the state governments; but the power to make internal improvements is municipal; therefore it belongs to the state governments alone. I deny both the premises and the conclusion. If the gentleman had affirmed that certain municipal powers, and the great mass of them, belong to the state governments, his proposition would have been incontrovertible. But if he had so qualified it, it would not have assisted the gentleman at all in his conclusion. But surely the power of taxation, the power to regulate the value of coin, the power to establish a uniform standard of weights and measures, to establish post offices and post roads, to regulate commerce among the several states, that in relation to the judiciary, besides many other powers indisputably belonging to the federal government, are strictly municipal. If, as I understood the gentleman in the course of the subsequent part of his argument to admit, some municipal powers belong to the one system, and some to the other, we shall derive very little aid from the gentleman's principle, in making the discrimination between the two. The question must ever remain open—whether any given power, and, of course, that in question, is or is not delegated to this government, or retained by the states?

The conclusion of the gentleman is, that all internal improvements belong to the state governments: that



they are of a limited and local character, and are not comprehended within the scope of the federal powers, which relate to external or general objects. That many, perhaps most internal improvements, partake of the character described by the gentleman, I shall not deny. But it is no less true that there are others, emphatically national, which neither the policy, nor the power, nor the interests, of any state will induce it to accomplish, and which can only be effected by the application of the resources of the nation. The improvement of the navigation of the Mississippi furnishes a striking example. This is undeniably a great and important object. The report of a highly scientific and intelligent officer of the engineer corps, (which I hope will be soon taken up and acted upon,) has shown that the cost of any practicable improvement in the navigation of that river, in the present state of the inhabitants of its banks, is a mere trifle in comparison to the great benefits which would accrue from it. I believe that about double the amount of the loss of a single steamboat and cargo, (the Tennessee,) would effect the whole improvement in the navigation of that river, which ought to be at this time attempted. In this great object twelve states and two territories are, in different degrees, interested. The power to effect the improvement of that river is surely not municipal, in the sense in which the gentleman used the term. If it were, to which of the twelve states and two territories concerned does it belong? It is a great object, which can only be effected by a confederacy. And here is existing that confederacy, and no other can lawfully exist: for the constitution prohibits the states, immediately interested, from entering into any treaty or compact with each other. Other examples might be given to show, that, if even the power existed, the inclination to exert it would not be felt, to effectuate certain improvements eminently calculated to promote the prosperity of the union. Neither of the three states, nor all of them united, through which the Cumberland road passes, would ever have erected



that road. Two of them would have thrown in every impediment to its completion in their power. Federative in its character, it could only have been executed so far by the application of federative means. Again, the contemplated canal through New Jersey; that to connect the waters of the Chesapeake and Delaware; that to unite the Ohio and the Potomac, are all objects of a general and federative nature, in which the states, through which they might severally pass, could not be expected to feel any such special interest as would lead to their execution. Tending, as undoubtedly they would do, to promote the good of the whole, the power and the treasure of the whole must be applied to their execution, if they are ever consummated.

I do not think, then, that we shall be at all assisted in expounding the constitution of the United States, by the principle which the gentleman from Virginia has suggested in respect to municipal powers. The powers of both governments are undoubtedly municipal, often operating upon the same subject. I think a better rule than that which the gentleman furnished for interpreting the constitution, might be deduced from an attentive consideration of the peculiar character of the articles of confederation, as contrasted with that of the present constitution. By those articles, the powers of the thirteen United States were exerted collaterally. They operated through an intermediary. They were addressed to the several states, and their execution depended upon the pleasure and the co-operation of the states individually. The states seldom fulfilled the expectations of the general government in regard to its requisitions, and often wholly disappointed them. Languor and debility, in the movement of the old confederation, were the inevitable consequence of that arrangement of power. By the existing constitution, the powers of the general government act directly on the persons and things within its scope, without the intervention or impediments incident to any intermediary. In executing the great trust which the

constitution of the United States creates, we must, therefore, reject that interpretation of its provisions which would make the general government dependent upon those of the states for the execution of any of its powers ; and may safely conclude that the only genuine construction would be that which should enable this government to execute the great purposes of its institution, without the co-operation, and, if indispensably necessary, even against the will, of any particular state. This is the characteristic difference between the two systems of government, of which we should never lose sight. Interpreted in the one way, we shall relapse into the feebleness and debility of the old confederacy. In the other, we shall escape from its evils, and fulfil the great purposes which the enlightened framers of the existing constitution intended to effectuate. The importance of this essential difference in the two forms of government, will be shown in the future progress of the argument.

Before I proceed to comment upon those parts of the constitution which appear to me to convey the power in question, I hope I shall be allowed to disclaim, for my part, several sources whence others have deduced the authority. The gentleman from Virginia seemed to think it remarkable that the friends of the power should disagree so much among themselves ; and to draw a conclusion against its existence from the fact of this discrepancy. But I can see nothing extraordinary in this diversity of views. What is more common than for different men to contemplate the same subject under various aspects ? Such is the nature of the human mind, that enlightened men, perfectly upright in their intentions, differ in their opinions on almost every topic that could be mentioned. It is rather a presumption, in favor of the cause which I am humbly maintaining, that the same result should be attained by so many various modes of reasoning. But, if contrariety of views may be pleaded with any effect against the advocates of the disputed power, it equally avails against their opponents. There is, for exam-



ple, not a very exact coincidence in opinion between the President of the United States and the gentleman from Virginia. The President says, (page 25 of his book,) "the use of the existing road, by the stage, mail carrier, or post boy, in passing over it, as others do, is all that would be thought of; the jurisdiction and soil remaining to the state, with a right in the state, or those authorized by its legislature, to change the road at pleasure." Again, page 27, the President asks, "if the United States possessed the power, contended for under this grant, might they not, in adopting the roads of the individual states, for the carriage of the mail, as has been done, assume jurisdiction over them, and preclude a right to interfere with or alter them?" They both agree that the general government does not possess the power. The gentleman from Virginia admits, if I understood him correctly, that the designation of a state road as a post road, so far withdraws it from the jurisdiction of the state, that it cannot be afterwards put down or closed by the state; and in this he claims for the general government more power than the President concedes to it. The President, on the contrary, pronounces that "the absurdity of such a pretension," (that is, preventing, by the designation of a post road, the power of the state from altering or changing it,) "must be apparent to all who examine it!" The gentleman thinks that the designation of a post road withdraws it entirely, so far as it is used for that purpose, from the power of the whole state; whilst the President thinks it absurd to assert that a mere county court may not defeat the execution of a law of the United States! The President thinks that, under the power of appropriating the money of the United States, Congress may apply it to any object of internal improvement, provided it does not assume any territorial jurisdiction; and, in this respect, he claims for the general government more power than the gentleman from Virginia assigns to it. And I must own, that I so far coincide with the gentleman from Virginia. If the power can be traced to no more



legitimate source than to that of appropriating the public treasure, I yield the question.

The truth is, that there is no specific grant, in the constitution, of the power of appropriation; nor was any such requisite. It is a resulting power. The constitution vests in Congress the power of taxation, with but few limitations, to raise a public revenue. It then enumerates the powers of Congress. And it follows, of necessity, that Congress has the right to apply the money, so raised, to the execution of the powers so granted. The clause, which concludes the enumeration of the granted powers, by authorizing the passage of all laws, "necessary and proper" to effectuate them, comprehends the power of appropriation. And the framers of the constitution recognize it by the restriction, that no money shall be drawn from the treasury but in virtue of a previous appropriation by law. It is to me wonderful how the President should have brought his mind to the conclusion, that, under the power of appropriation, thus incidentally existing, a right could be set up, in its nature almost without limitation, to employ the public money. He combats with great success and much ability, any deduction of power from the clause relating to the general welfare. He shows that the effect of it would be to overturn, or render useless and nugatory, the careful enumeration of our powers; and that it would convert a cautiously limited government into one without limitation. The same process of reasoning by which his mind was brought to this just conclusion, one would have thought, should have warned him against his claiming, under the power of appropriation, such a vast latitude of authority. He reasons strongly against the power, as claimed by us, harmless and beneficent and limited, as it must be admitted to be, and yet he sets up a power boundless in its extent, unrestrained to the object of internal improvements, and comprehending the whole scope of human affairs! For, if the power exists, as he asserts it, what human restraint is there upon it? He does, indeed, say, that it cannot be exerted so as to interfere

with the territorial jurisdiction of the states. But this is a restriction altogether gratuitous, flowing from the bounty of the President, and not found in the prescriptions of the constitution. If we have a right, indefinitely, to apply the money of the government to internal improvements, or to any other object, what is to prevent the application of it to the purchase of the sovereignty itself, of a state, if a state were mean enough to sell its sovereignty—to the purchase of kingdoms, empires, the globe itself? With an almost unlimited power of taxation; and, after the revenue is raised, with a right to apply it under no other limitations than those which the President's caution has suggested, I cannot see what other human power is needed. It has been said, by Cæsar or Bonaparte, no doubt thought by both, that, with soldiers enough, they could get money enough; and, with money enough, they could command soldiers enough. According to the President's interpretation of the constitution, one of these great levers of public force and power is possessed by this government. The President seems to contemplate, as fraught with much danger, the power, humbly as it is claimed, to effect the internal improvement of the country. And, in his attempt to overthrow it, sets up one of infinitely greater magnitude. The quantum of power, which we claim over the subject of internal improvement, is, it is true, of greater amount and force than that which results from the President's view of the constitution; but then it is limited to the object of internal improvements; whilst the power set up by the President has no such limitation; and, in effect, as I conceive, has no limitation whatever, but that of the ability of the people to bear taxation.

With the most profound respect for the President, and after the most deliberate consideration of his argument, I cannot agree with him. I cannot think that any political power accrues to this government, from the mere authority which it possesses to appropriate the public revenue. The power to make internal improvements draws after it, most certainly, the right to



appropriate money to consummate the object. But I cannot conceive that this right of appropriation draws after it the power of internal improvements. The appropriation of money is consequence, not cause. It follows, it does not precede. According to the order of nature, we first determine upon the object to be accomplished, and then appropriate the money necessary to its consummation. According to the order of the constitution, the power is defined, and the application, that is, the appropriation of the money requisite to its effectuation, follows as a necessary and proper means. The practice of congressional legislation is conformable to both. We first inquire what we may do, and provide by law for its being done, and we then appropriate, by another act of legislation, the money necessary to accomplish the specified object. The error of the argument lies in its beginning too soon. It supposes the money to be in the treasury, and then seeks to disburse it. But how came it there? Congress cannot impose taxes without an object. Their imposition must be in reference to the whole mass of our powers, to the general purposes of government, or with the view to the fulfilment of some one of those powers, or to the attainment of some one of those purposes. In either case, we consult the constitution, and ascertain the extent of the authority which is confided to us. We cannot, constitutionally lay the taxes without regard to the extent of our powers; and then, having acquired the money of the public, appropriate it, because we have got it, to any object indefinitely.

Nor do I claim the power in question, from the consent or grant of any particular state or states, through which an object of internal improvement may pass. It may, indeed, be prudent to consult a state through which such an improvement may happen to be carried, from considerations of deference and respect to its sovereign power; and from a disposition to maintain those relations of perfect amity which are ever desirable between the general and state governments.



But the power to establish the improvement, must be found in the constitution, or it does not exist. And what is granted by all, it cannot be necessary to obtain the consent of some to perform.

The gentleman from Virginia, in speaking of incidental powers, used a species of argument which I entreat him candidly to reconsider. He said, that the chain of cause and effect was without end; that if we argued from a power expressly granted to all others, which might be convenient or necessary to its execution, there were no bounds to the power of this government; that, for example, under the power "to provide and maintain a navy," the right might be assumed to the timber necessary to its construction, and the soil on which it grew. The gentleman might have added, the acorns from which it sprung. What, upon the gentleman's own hypothesis, ought to have been his conclusion? That Congress possessed no power to provide and maintain a navy. Such a conclusion would have been quite as logical, as that Congress has no power over internal improvements, from the possible lengths to which this power may be pushed. No one ever has, or can controvert the existence of incidental powers. We may apply different rules for their extraction, but all must concur in the necessity of their actual existence. They result from the imperfections of our nature, and from the utter impossibility of foreseeing all the turns and vicissitudes in human affairs. They cannot be defined. Much is attained when the power, the end, is specified and guarded. Keeping that constantly in view, the means necessary to its attainment must be left to the sound and responsible discretion of the public functionary. Intrench him as you please, employ what language you may, in the constitutional instrument, "necessary and proper," "indispensably necessary," or any other, and the question is still left open—does the proposed measure fall within the scope of the incidental power, circumscribed as it may be? Your safety against abuse must rest in his interest, his integrity, his responsibility to

the exercise of the elective franchise; finally, in the ultimate right, when all other redress fails, of an appeal to the remedy, to be used only in extreme cases, of forcible resistance against intolerable oppression.

Doubtless, by an extravagant and abusive enlargement of incidental powers, the state governments may be reduced within too narrow limits. Take any power, however incontestably granted to the general government, and employ that kind of process of reasoning in which the gentleman from Virginia is so skilful, by tracing it to its remotest effects, you may make it absorb the powers of the state governments. Pursue the opposite course; take any incontestable power belonging to the state governments, and follow it out into all its possible ramifications, and you may make it thwart and defeat the great operations of the government of the whole. This is the consequence of our systems. Their harmony is to be preserved only by forbearance, liberality, practical good sense, and mutual concession. Bring these dispositions into the administrations of our various institutions, and all the dreaded conflicts of authorities will be found to be perfectly imaginary.

I disclaim, for myself, several sources to which others have ascended, to arrive at the power in question. In making this disclaimer, I mean to cast no imputation on them. I am glad to meet them by whatever road they travel, at the point of a constitutional conclusion. Nor do their positions weaken mine; on the contrary, if correctly taken, and mine also are justified by fair interpretation, they add strength to mine. But I feel it my duty, frankly and sincerely, to state my own views of the constitution. In coming to the ground on which I make my stand to maintain the power, and where I am ready to meet its antagonist, I am happy, in the outset, to state my hearty concurrence with the gentleman from Virginia, in the old, 1798, republican principles, (now become federal, also,) by which the constitution is to be interpreted. I agree with him, that this is a limited government:



that it has no powers but the granted powers; and that the granted powers are those which are expressly enumerated, or such as, being implied, are necessary and proper to effectuate the enumerated powers. And, if I do not show the power over federative, national, internal improvements, to be fairly deducible, after the strictest application of these principles, I entreat the committee unanimously to reject the bill. The gentleman from Virginia has rightly anticipated, that, in regard to roads, I claim the power, under the grant, to establish post offices and post roads. The whole question, on this part of the subject, turns upon the true meaning of this clause, and that again upon the genuine signification of the word "establish." According to my understanding of it, the meaning of it is, to fix, to make firm, to build. According to that of the gentleman from Virginia, it is to designate, to adopt. Grammatical criticism was to me always unpleasant, and I do not profess to be any proficient in it. But I will confidently appeal, in support of my definition, to any vocabulary whatever, of respectable authority, and to the common use of the word. That it cannot mean only adoption, is to me evident; for adoption pre-supposes establishment, which is precedent in its very nature. That which does not exist, which is not established, cannot be adopted. There is, then, an essential difference between the gentleman from Virginia and me. I consider the power as original and creative; he as derivative, adoptive. But I will show, out of the mouth of the President himself, who agrees with the gentleman from Virginia, as to the sense of this word, that what I contend for is its genuine meaning. The President, in almost the first lines of his message to this House, of the fourth of May, 1822, returning the Cumberland bill with his veto, says, "a power to establish turnpikes, with gates and tolls, &c. implies a power to adopt and execute a complete system of internal improvement." What is the sense in which the word "establish" is here used? Is it not creative? Did the President mean to adopt



or designate some pre-existing turnpikes, with gates, &c. or, for the first time, to set them up, under the authority of Congress? Again, the President says, "if it exist as to one road, [that is, the power to lay duties of transit, and to take the land on a valuation,] it exists as to any other, and to as many roads as Congress may think proper to 'establish.' " In what sense does he here employ the word? The truth is, that the President could employ no better than the constitutional word, and he is obliged to use it in the precise sense for which I contend. But I go to a higher authority than that of the chief magistrate—to that of the constitution itself. In expounding that instrument, we must look at all its parts; and if we find a word, the meaning of which it is desirable to obtain, we may safely rest upon the use which has been made of the same word in other parts of the instrument. The word "establish" is one of frequent recurrence in the constitution; and I venture to say, that it will be found uniformly to express the same idea. In the clause enumerating our powers, Congress has power "to establish a uniform rule of naturalization," &c. In the preamble, "We, the people of the United States, in order to form a more perfect union, establish justice, &c. do ordain and establish this constitution," &c. What pre-existing code of justice was adopted? Did not the people of the United States, in this high, sovereign act, contemplate the construction of a code adapted to their federal condition? The sense of the word, as contended for, is self-evident, when applied to the constitution.

But let us look at the nature, object and purposes of the power. The trust confided to Congress was one of the most beneficial character. It was the diffusion of information among all the parts of this republic. It was the transmission and circulation of intelligence; it was to communicate knowledge of the laws and acts of government; and to promote the great business of society in all its relations. This was a great trust, capable of being executed in a highly salutary

manner. It could be executed only by Congress, and it should be as well performed as it could be, considering the wants and exigencies of government. And here I beg leave to advert to the principle which I some time ago laid down, that the powers granted to this government are to be carried into execution by its own inherent force and energy, without necessary dependence upon the state governments. If my construction secures this object; and if that of my opponents places the execution of this trust at the pleasure and mercy of the state governments, we must reject theirs and assume mine. But the construction of the President does make it so dependent. He contends that we can only use, as post roads, those which the states shall have previously established; that they are at liberty to alter, to change, and of course to shut them up at pleasure. It results from this view of the President that any of the great mail routes now existing, that, for example, from south to north, may be closed at pleasure or by caprice, by any one of the states, or its authorities, through which it passes—by that of Delaware or any other. Is it possible that that construction of the constitution can be correct, which allows a law of the United States, enacted for the good of the whole, to be obstructed or defeated in its operation by any one of twenty-four sovereignties? The gentleman from Virginia, it is true, denies the right of a state to close a road which has been designated as a post road. But suppose the state, no longer having occasion to use it for its own separate and peculiar purposes, withdraws all care and attention from its preservation. Can the state be compelled to repair it? No! the gentleman from Virginia must say, and I will say—may not the general government repair this road which is abandoned by the state power? May it not repair it in the most efficacious manner? And may it not protect and defend that which it has thus repaired, and which there is no longer an interest or inclination in the state to protect and defend? Or does the gentleman mean to contend that a



road may exist in the statute book, which a state will not, and the general government cannot, repair and improve? And what sort of an account should we render to the people of the United States, of the execution of the high trust confided, for their benefit, to us, if we were to tell them that we had failed to execute it, because a state would not make a road for us?

The roads, and other internal improvements of states, are made in reference to their individual interests. It is the eye only of the whole, and the power of the whole, that can look to the interests of all. In the infancy of the government, and the actual state of the public treasury, it may be the only alternative left us to use those roads, which are made for state purposes, to promote the national object, ill as they may be adapted to it. It may never be necessary to make more than a few great national arteries of communication, leaving to the states the lateral and minor ramifications. Even these should only be executed, without pressure upon the resources of the country, and according to the convenience and ability of government. But, surely, in the performance of a great national duty imposed upon this government, which has for its object the distribution of intelligence, civil, commercial, literary and social, we ought to perform the substance of the trust, and not content ourselves with a mere inefficient paper execution of it. If I am right in these views, the power to establish post roads being in its nature original and creative, and the government having adopted the roads made by state means, only from its inability to exert the whole extent of its authority, the controverted power is expressly granted to Congress, and there is an end of the question.

It ought to be borne in mind, that this power over roads was not contained in the articles of confederation, which limited Congress to the establishment of post offices; and that the general character of the present constitution, as contrasted with those articles, is that of an enlargement of power. But, if the con-



struction of my opponents be correct, we are left precisely where the articles of confederation left us, notwithstanding the additional words contained in the present constitution. What, too, will the gentlemen do with the first member of the clause to establish post offices? Must Congress adopt, designate, some pre-existing office, established by state authority? But there is none such. May it not then fix, build, create, establish offices of its own?

The gentleman from Virginia sought to alarm us by the awful emphasis with which he set before us the total extent of post roads in the union. Eighty thousand miles of post roads! exclaimed the gentleman; and will you assert for the general government jurisdiction, and erect turnpikes, on such an immense distance? Not to-day, nor to-morrow; but this government is to last, I trust, forever: we may at least hope it will endure until the wave of population, cultivation and intelligence, shall have washed the rocky mountains and mingled with the Pacific. And may we not also hope that the day will arrive when the improvements and the comforts of social life shall spread over the wide surface of this vast continent? All this is not to be suddenly done. Society must not be burdened or oppressed. Things must be gradual and progressive. The same species of formidable array which the gentleman makes, might be exhibited in reference to the construction of a navy, or any other of the great purposes of government. We might be told of the fleets and vessels of great maritime powers, which whiten the ocean; and triumphantly asked if we should vainly attempt to cope with or rival that tremendous power? And we should shrink from the effort, if we were to listen to his counsels, in hopeless despair. Yes, sir, it is a subject of peculiar delight to me to look forward to the proud and happy period, distant as it may be, when circulation and association between the Atlantic and Pacific and the Mexican gulf, shall be as free and perfect as they are at this moment in England, or in any other the most highly improved country on

the globe. In the mean time, without bearing heavily upon any of our important interests, let us apply ourselves to the accomplishment of what is most practicable and immediately necessary.

But what most staggers my honorable friend, is the jurisdiction over the sites of roads and other internal improvements which he supposes Congress might assume; and he considers the exercise of such a jurisdiction as furnishing the just occasion for serious alarm. Let us analyze the subject. Prior to the erection of a road under the authority of the general government, there existed, in the state through which it passes, no actual exercise of jurisdiction over the ground which it traverses as a road. There was only the possibility of the exercise of such a jurisdiction, when the state should, if ever, erect such a road. But the road is made by the authority of Congress, and out of the fact of its erection arises a necessity for its preservation and protection. The road is some thirty or fifty or sixty feet in width, and with that narrow limit passes through a part of the territory of the state. The capital expended in the making of the road incorporates itself with, and becomes a part of the permanent and immoveable property of the state. The jurisdiction which is claimed for the general government, is that only which relates to the necessary defence, protection, and preservation of the road. It is of a character altogether conservative. Whatever does not relate to the existence and protection of the road remains with the state. Murders, trespasses, contracts, all the occurrences and transactions of society upon the road, not affecting its actual existence, will fall within the jurisdiction of the civil or criminal tribunals of the state, as if the road had never been brought into existence. How much remains to the state? How little is claimed for the general government? Is it possible that a jurisdiction so limited, so harmless, so unambitious, can be regarded as seriously alarming to the sovereignty of the states? Congress now asserts and exercises, without contestation,



a power to protect the mail in its transit, by the sanction of all suitable penalties. The man who violates it is punished with death, or otherwise, according to the circumstances of the case. This power is exerted as incident to that of establishing post offices and post roads. Is the protection of the thing *in transitu* a power more clearly deducible from the grant, than that of facilitating, by means of a practicable road, its actual transportation? Mails certainly imply roads, roads imply their own preservation, their preservation implies the power to preserve them, and the constitution tells us, in express terms, that we shall establish the one and the other.

In respect to cutting canals, I admit the question is not quite so clear as in regard to roads. With respect to these, as I have endeavored to show, the power is expressly granted. In regard to canals, it appears to me to be fairly comprehended in, or deducible from, certain granted powers. Congress has power to regulate commerce with foreign nations and among the several states. Precisely the same measure of power which is granted in the one case is conferred in the other. And the uniform practical exposition of the constitution, as to the regulation of foreign commerce, is equally applicable to that among the several states. Suppose, instead of directing the legislation of this government constantly, as heretofore, to the object of foreign commerce, to the utter neglect of the interior commerce among the several states, the fact had been reversed, and now, for the first time, we were about to legislate for our foreign trade. Should we not, in that case, hear all the constitutional objections made to the erection of buoys, beacons, light-houses, the surveys of coasts, and the other numerous facilities accorded to the foreign trade, which we now hear to the making of roads and canals? Two years ago, a sea-wall, or, in other words, a marine canal, was authorized by an act of Congress, in New Hampshire; and I doubt not that many of those voted for it who have now constitutional scruples on this bill. Yes, any thing,



every thing, may be done for foreign commerce; any thing, every thing, on the margin of the ocean; but nothing for domestic trade; nothing for the great interior of the country! Yet, the equity and the beneficence of the constitution equally comprehends both. The gentleman does, indeed, maintain, that there is a difference as to the character of the facilities in the two cases. But I put it to his own candor, whether the only difference is not that which springs from the nature of the two elements on which the two species of commerce are conducted—the difference between land and water. The principle is the same, whether you promote commerce by opening for it an artificial channel where now there is none, or by increasing the ease or safety with which it may be conducted through a natural channel, which the bounty of Providence has bestowed. In the one case, your object is to facilitate arrival and departure from the ocean to the land. In the other, it is to accomplish the same object from the land to the ocean. Physical obstacles may be greater in the one case than in the other, but the moral or constitutional power equally includes both. The gentleman from Virginia has, to be sure, contended that the power to make these commercial facilities was to be found in another clause of the constitution—that which enables Congress to obtain cessions of territory for specific objects, and grants to it an exclusive jurisdiction. These cessions may be obtained for the “erection of forts, magazines, arsenals, dockyards, or other needful buildings.” It is apparent that it relates altogether to military or naval affairs, and not to the regulation of commerce. How was the marine canal covered by this clause? Is it to be considered as a “needful building?” The object of this power is perfectly obvious. The convention saw that, in military or naval posts, such as are indicated, it was indispensably necessary, for their proper government, to vest in Congress the power of exclusive legislation. If we claimed, over objects of internal improvement, an exclusive jurisdiction, the gentleman might urge, with much

force, the clause in question. But the claim of concurrent jurisdiction only is asserted. The gentleman professes himself unable to comprehend how concurrent jurisdiction can be exercised by two different governments at the same time, over the same persons and things. But, is not this the fact with respect to the state and federal governments? Does not every person, and every thing, within our limits, sustain a twofold relation to the state and to the federal authority? The power of taxation, as exerted by both governments, that over the militia, besides many others, is concurrent. No doubt embarrassing cases may be conceived and stated by gentlemen of acute and ingenious minds. One was put to me yesterday. Two canals are desired, one by the federal, and the other by a state government; and there is not a supply of water but for the feeder of one canal—which is to take it? The constitution, which ordains the supremacy of the laws of the United States, answers the question. The good of the whole is paramount to the good of a part. The same difficulty might possibly arise in the exercise of the incontestable power of taxation. We know that the imposition of taxes has its limits. There is a maximum which cannot be transcended. Suppose the citizen to be taxed by the general government to the utmost extent of his ability, or a thing as much as it can possibly bear, and the state imposes a tax at the same time—which authority is to take it? Extreme cases of this sort may serve to amuse and to puzzle; but they will hardly ever arise in practice. And we may safely confide in the moderation, good sense, and mutual good dispositions, of the two governments, to guard against the imagined conflicts.

It is said by the President, that the power to regulate commerce merely authorizes the laying of imposts and duties. But Congress has no power to lay imposts and duties on the trade among the several states. The grant must mean, therefore, something else. What is it? The power to regulate commerce

among the several states, if it has any meaning, implies authority to foster it, to promote it, to bestow on it facilities similar to those which have been conceded to our foreign trade. It cannot mean only an empty authority to adopt regulations, without the capacity to give practical effect to them. All the powers of this government should be interpreted in reference to its first, its best, its greatest object, the union of these states. And is not that union best invigorated by an intimate, social and commercial connexion between all the parts of the confederacy? Can that be accomplished, that is, can the federative objects of this government be attained, but by the application of federative resources?

Of all the powers bestowed on this government, I think none are more clearly vested, than that to regulate the distribution of the intelligence, private and official, of the country; to regulate the distribution of its commerce; and to regulate the distribution of the physical force of the union. In the execution of the high and solemn trust which these beneficial powers imply, we must look to the great ends which the framers of our admirable constitution had in view. We must reject, as wholly incompatible with their enlightened and beneficent intentions, that construction of these powers which would resuscitate all the debility and inefficiency of the ancient confederacy. In the vicissitudes of human affairs, who can foresee all the possible cases, in which it may be necessary to apply the public force, within or without the union? This government is charged with the use of it, to repel invasions, to suppress insurrections, to enforce the laws of the union; in short, for all the unknown and undefinable purposes of war, foreign or intestine, wherever and however it may rage. During its existence, may not government, for its effectual prosecution, order a road to be made, or a canal to be cut, to relieve, for example, an exposed point of the union? If, when the emergency comes, there is a power to provide for it, that power must exist in the constitution, and not



in the emergency. A wise, precautionary, and parental policy, anticipating danger, will beforehand provide for the hour of need. Roads and canals are in the nature of fortifications, since, if not the deposits of military resources, they enable you to bring into rapid action, the military resources of the country, whatever they may be. They are better than any fortifications, because they serve the double purposes of peace and of war. They dispense, in a great degree, with fortifications, since they have all the effect of, that concentration, at which fortifications aim. I appeal from the precepts of the President to the practice of the President. While he denies to Congress the power in question, he does not scruple, upon his sole authority, as numerous instances in the statute book will testify, to order, at pleasure, the opening of roads by the military, and then come here to ask us to pay for them. Nay, more, sir; a subordinate, but highly respectable officer of the executive government, I believe, would not hesitate to provide a boat or cause a bridge to be erected over an inconsiderable stream, to ensure the regular transportation of the mail. And it happens to be within my personal knowledge, that the head of the post office department, as a prompt and vigilant officer should do, has recently despatched an agent to ascertain the causes of the late frequent vexatious failures of the great northern mail, and to inquire if a provision of a boat or bridge over certain small streams in Maryland, which have produced them, would not prevent their recurrence.

I was much surprised at one argument of the honorable gentleman. He told the House, that the constitution had carefully guarded against inequality, among the several states, in the public burdens, by certain restrictions upon the power of taxation; that the effect of the adoption of a system of internal improvements would be to draw the resources from one part of the union, and to expend them in the improvements of another; and that the spirit, at least, of the constitutional equality, would be thus violated. From the nature

of things, the constitution could not specify the theatre of the expenditure of the public treasure. That expenditure, guided by and looking to the public good, must be made, necessarily, where it will most subserve the interests of the whole union. The argument is, that the *locale* of the collection of the public contributions, and the *locale* of their disbursement, should be the same. Now, sir, let us carry this argument out; and no man is more capable than the ingenious gentleman from Virginia, of tracing an argument to its utmost consequences. The *locale* of the collection of the public revenue is the pocket of the citizen; and, to abstain from the violation of the principle of equality adverted to by the gentleman, we should restore back to each man's pocket precisely what was taken from it. If the principle contended for be true, we are habitually violating it. We raise about twenty millions of dollars, a very large revenue, considering the actual distresses of the country. And, sir, notwithstanding all the puffing, flourishing statements of its prosperity, emanating from printers who are fed upon the pap of the public treasury, the whole country is in a condition of very great distress. Where is this vast revenue expended? Boston, New York, the great capitals of the north, are the theatres of its disbursement. There the interest upon the public debt is paid. There the expenditure in the building, equipment, and repair of the national vessels takes place. There all the great expenditures of the government necessarily concentrate. This is no cause of just complaint. It is inevitable, resulting from the accumulation of capital, the state of the arts, and other circumstances belonging to our great cities. But, sir, if there be a section of this union having more right than any other to complain of this transfer of the circulating medium from one quarter of the union to another, the west, the poor west—[Here Mr. Barbour explained. He had meant that the constitution limited Congress as to the proportions of revenue to be drawn from the several states; but the principle of this provision



would be vacated by internal improvements of immense expense, and yet of a local character. Our public ships, to be sure, are built at the seaports, but they do not remain there. Their home is the mountain wave; but internal improvements are essentially local; they touch the soil of the states, and their benefits, at least the largest part of them, are confined to the states where they exist.] The explanation of the gentleman has not materially varied the argument. He says that the home of our ships is the mountain wave. Sir, if the ships go to sea, the money with which they were built, or refitted, remains on shore, and the cities where the equipment takes place derive the benefit of the expenditure. It requires no stretch of the imagination to conceive the profitable industry—the axes, the hammers, the saws—the mechanic arts, which are put in motion by this expenditure. And all these, and other collateral advantages, are enjoyed by the seaports. The navy is built for the interest of the whole. Internal improvements, of that general, federative character, for which we contend, would also be for the interest of the whole. And, I should think their abiding with us, and not going abroad on the vast deep, was rather cause of recommendation than objection.

But, Mr. Chairman, if there be any part of this union more likely than all others to be benefited by the adoption of the gentleman's principle, regulating the public expenditure, it is the west. There is a perpetual drain from that embarrassed and highly distressed portion of our country, of its circulating medium to the east. There, but few and inconsiderable expenditures of the public money take place. There we have none of those public works, no magnificent edifices, forts, armories, arsenals, dockyards, &c. which more or less are to be found in every Atlantic state. In at least seven states beyond the Alleghany, not one solitary public work of this government is to be found. If, by one of those awful and terrible dispensations of Providence, which sometimes occur, this gov-



ernment should be unhappily annihilated, everywhere on the seaboard traces of its former existence would be found; whilst we should not have, in the west, a single monument remaining on which to pour out our affections and our regrets. Yet, sir, we do not complain. No portion of your population is more loyal to the union, than the hardy freemen of the west. Nothing can weaken or eradicate their ardent desire for its lasting preservation. None are more prompt to vindicate the interests and rights of the nation from all foreign aggression. Need I remind you of the glorious scenes in which they participated, during the late war—a war in which they had no peculiar or direct interest, waged for no commerce, no seamen of theirs. But it was enough for them that it was a war demanded by the character and the honor of the nation. They did not stop to calculate its cost of blood, or of treasure. They flew to arms; they rushed down the valley of the Mississippi, with all the impetuosity of that noble river. They sought the enemy. They found him at the beach. They fought; they bled; they covered themselves and their country with immortal glory. They enthusiastically shared in all the transports occasioned by our victories, whether won on the ocean or on the land. They felt, with the keenest distress, whatever disaster befel us. No, sir, I repeat it, neglect, injury itself, cannot alienate the affections of the west from this government. They cling to it, as to their best, their greatest, their last hope. You may impoverish them, reduce them to ruin, by the mistakes of your policy, and you cannot drive them from you. They do not complain of the expenditure of the public money, where the public exigencies require its disbursement. But, I put it to your candor, if you ought not, by a generous and national policy, to mitigate, if not prevent, the evils resulting from the perpetual transfer of the circulating medium from the west to the east. One million and a half of dollars annually, is transferred for the public lands alone; and, almost every dollar goes, like him who

goes to death—to a bourne from which no traveller returns. In ten years it will amount to fifteen millions; in twenty to——but I will not pursue the appalling results of arithmetic. Gentlemen who believe that these vast sums are supplied by emigrants from the east, labor under great error. There was a time when the tide of emigration from the east bore along with it the means to effect the purchase of the public domain. But that tide has, in a great measure, now stopt. And as population advances farther and farther west, it will entirely cease. The greatest migrating states in the union, at this time, are Kentucky first, Ohio next, and Tennessee. The emigrants from those states carry with them, to the states and territories lying beyond them, the circulating medium, which, being invested in the purchase of the public land, is transmitted to the points where the wants of government require it. If this debilitating and exhausting process were inevitable, it must be borne with manly fortitude. But we think that a fit exertion of the powers of this government would mitigate the evil. We believe that the government incontestably possesses the constitutional power to execute such internal improvements as are called for by the good of the whole. And we appeal to your equity, to your parental regard, to your enlightened policy, to perform the high and beneficial trust thus sacredly reposed. I am sensible of the delicacy of the topic to which I have reluctantly adverted, in consequence of the observations of the honorable gentleman from Virginia. And I hope there will be no misconception of my motives in dwelling upon it. A wise and considerate government should anticipate and prevent, rather than wait for the operation of causes of discontent.

Let me ask, Mr. Chairman, what has this government done on the great subject of internal improvements, after so many years of its existence, and with such an inviting field before it? You have made the Cumberland road, only. Gentlemen appear to have considered that a western road. They ought to recollect that not one stone has yet been broken, not one spade



of earth has been yet removed in any western state. The road begins in Maryland and it terminates at Wheeling. It passes through the states of Maryland, Pennsylvania and Virginia. All the direct benefit of the expenditure of the public money on that road, has accrued to those three states. Not one cent in any western state. And yet we have had to beg, entreat, supplicate you, session after session, to grant the necessary appropriations to complete the road. I have myself toiled until my powers have been exhausted and prostrated, to prevail on you to make the grant. We were actuated to make these exertions for the sake of the collateral benefit only to the west; that we might have a way by which we should be able to continue and maintain an affectionate intercourse with our friends and brethren; that we might have a way to reach the capitol of our country, and to bring our counsels, humble as they may be, to consult and mingle with yours in the advancement of the national prosperity. Yes, sir, the Cumberland road has only reached the margin of a western state; and, from some indications which have been given during this session, I should apprehend it would there pause forever, if my confidence in you were not unbounded, if I had not before witnessed that appeals were never unsuccessful to your justice, to your magnanimity, to your fraternal affection.

But, sir, the bill on your table is no western bill. It is emphatically a national bill, comprehending all, looking to the interests of the whole. The people of the west never thought of, never desired, never asked, for a system exclusively for their benefit. The system contemplated by this bill looks to great national objects, and proposes the ultimate application to their accomplishment of the only means by which they can be effected, the means of the nation—means which, if they be withheld from such objects, the union, I do most solemnly believe, of these now happy and promising states, may, at some distant (I trust a far, far distant) day, be endangered and shaken at its centre.



# SPEECH OF ALEXANDER HAMILTON,

IN THE CASE OF

THE PEOPLE *VS.* CROSWELL,

ON AN INDICTMENT FOR A LIBEL ON PRESIDENT JEFFERSON; BEFORE THE SUPREME COURT OF THE STATE OF NEW YORK, 1804.



Mr. Hamilton for the defendant, on a motion for a new trial.

MAY IT PLEASE THE COURT;

IN arising to address your Honors at so late a period of the day, and after your attention has been so much fatigued, and the cause has been so ably handled, I may say, so exhausted, I feel a degree of embarrassment, which it is with difficulty I can surmount. I fear lest it should not be possible for me to interest the attention of the court, on the subject on which I have to speak. Nevertheless, I have a duty to perform, of which I cannot acquit myself, but by its execution. I have, however, this consolation, that, though I may fail in the attempt, I shall be justified by the importance of the question. I feel that it is of the utmost magnitude; of the highest importance viewed in every light. First, as it regards the character of the head of our nation; ed, for, if indeed the truth can be given in evidence, and that truth, can, as stated in the indictment, be established, it will be a serious truth, the effect of which it will be impossible to foresee. It is important also, as it regards the boundaries of power between the constituent parts of our constitutional tribunals, to which we are, for the law and the fact, to resort—our judges and our juries. It is important, as it regards settling the right principles that may be applied to the case, in giving to either the one or the other, the authority destined to

it by the spirit and letter of our law. It is important on account of the influence it must have on the rights of our citizens. Viewing it, therefore, in these lights, I hope I shall, in the arduous attempt, be supported by its importance, and if any doubt hangs on the mind of the court, I shall, I trust, be able to satisfy them that a new trial ought to be had.

The question branches itself into two divisions. The first as to the truth—whether, under a general issue of not guilty, it ought to be given in evidence. The other, as to the power of the court—whether it has a right, exclusively, over the intent, or whether that and the law do not constitute one complicated fact, for the cognizance of the jury, under the direction of the judge. The last, I trust, can be made to appear, on the principles of our jurisprudence, as plainly as it is possible to evince any thing to a court; and that in fact, there are no precedents which embrace the doctrines of the other side, or rather that they are so diverse, and contrariant, that nothing can arise from them to make an application to this case.

After these preliminary observations, and before I advance to the full discussion of this question, it may be necessary for the safety and accuracy of investigation, a little to define what this liberty of the press is, for which we contend, and which the present doctrines of those opposed to us, are, in our opinions, calculated to destroy.

The liberty of the press consists, in my idea, in publishing the truth, from good motives and for justifiable ends, though it reflect on government, on magistrates, or individuals. If it be not allowed, it excludes the privilege of canvassing men, and our rulers. It is in vain to say, you may canvass measures. This is impossible without the right of looking to men. To say that measures can be discussed, and that there shall be no bearing on those, who are the authors of those measures, cannot be done. The very end and reason of discussion would be destroyed. Of what consequence to show, its object? Why is it to be thus de-

monstrated, if not to show, too, who is the author? It is essential to say, not only that the measure is bad and deleterious, but to hold up to the people who is the author, that, in this our free and elective government, he may be removed from the seat of power. If this be not to be done, then in vain will the voice of the people be raised against the inroads of tyranny. For, let a party but get into power, they may go on from step to step, and, in spite of canvassing their measures, fix themselves firmly in their seats, especially as they are never to be reproached for what they have done. This abstract mode, in practice can never be carried into effect. But, if under the qualifications I have mentioned, the power be allowed, the liberty, for which I contend, will operate as a salutary check. In speaking thus for the freedom of the press, I do not say there ought to be an unbridled license; or that the characters of men who are good, will naturally tend eternally to support themselves. I do not stand here to say that no shackles are to be laid on this license.

I consider this spirit of abuse and calumny as the pest of society. I know the best of men are not exempt from the attacks of slander. Though it pleased God to bless us with the first of characters, and though it has pleased God to take him from us, and this band of calumniators, I say, that falsehood eternally repeated would have effected even his name. Drops of water, in long and continued succession, will wear out adamant. This, therefore, cannot be endured. It would be to put the best and the worst on the same level.

I contend for the liberty of publishing truth, with good motives and for justifiable ends, even though it reflect on government, magistrates or private persons. I contend for it under the restraint of our tribunals. When this is exceeded, let them interpose and punish. From this will follow none of those consequences so ably depicted. When, however, we do look at consequences, let me ask whether it is right that a permanent body of men, appointed by the executive, and, in some degree, always connected with it, should exclu-



sively have the power of deciding on what shall constitute a libel on our rulers, or that they shall share it, united with a changeable body of men, chosen by the people? Let our juries still be selected, as they now are, by lot. But it cannot be denied, that every permanent body of men is, more or less, liable to be influenced by the spirit of the existing administration; that such a body may be liable to corruption, and that they may be inclined to lean over towards party modes. No man can think more highly of our judges, and I may say personally so of those who now preside, than myself; but I must forget what human nature is, and what her history has taught us that permanent bodies may be so corrupted, before I can venture to assert that it cannot be. As then it may be, I do not think it safe thus to compromise our independence. For though, as individuals, they may be interested in the general welfare, yet, if once they enter into the views of government, their power may be converted into the engine of oppression. It is in vain to say that allowing them this exclusive right to declare the law, on what the jury has found, can work no ill; for, by this privilege, they can assume and modify the fact, so as to make the most innocent publication libellous. It is therefore not a security to say, that this exclusive power will but follow the law. It must be with the jury to decide on the intent; they must in certain cases be permitted to judge of the law, and pronounce on the combined matter of law and of fact. Passages have been adduced from lord Mansfield's declarations to show that judges cannot be under the influence of an administration. Yet still it would be contrary to our own experience, to say that they could not. I do not think that even as to our own country it may not be. There are always motives and reasons that may be held up. It is therefore still more necessary, here, to mingle this power, than in England. The person who appoints there, is hereditary. That person cannot alone attack the judiciary; he must be united with the two houses of lords and of commons, in assailing the judges. But, with us, it is the vibration of

party. As one side or the other prevails, so of that class and temperament will be the judges of their nomination. Ask any man, however ignorant of principles of government, who constitute the judicial? he will tell you the favorites of those at the head of affairs. According then to the theory of this, our free government, the independence of our judges, is not so well secured as in England. We have here reasons for apprehension not applicable to them. We are not, however, to be now influenced by the preference to one side or the other. But of which side soever a man may be, it interests all, to have the question settled, and to uphold the power of the jury, consistently however with liberty, and also with legal and judicial principles, fairly and rightly understood. None of these impair that for which we contend—the right of publishing the truth, from good motives and justifiable ends, though it reflect on government, on magistrates, or individuals.

Some observations have, however, been made in opposition to these principles. It is said, that, as no man rises, at once, high into office, every opportunity of canvassing his qualities and qualifications is afforded, without recourse to the press; that his first election ought to stamp the seal of merit on his name. This, however, is to forget how often the hypocrite goes from stage to stage of public fame, under false array, and how often, when men attain the last object of their wishes, they change from that which they seemed to be; that men, the most zealous reverers of the people's rights, have, when placed on the highest seat of power, become their most deadly oppressors. It becomes, therefore, necessary to observe the actual conduct of those who are thus raised up.

I have already shown, that, though libelling shall continue to be a crime, it ought to be so only when under a restraint, in which the court and the jury shall co-operate. What is a libel that it should be otherwise? Why take it out of the rule that allows, in all criminal cases, when the issue is general, the jury to

determine on the whole? What is then a libel to induce this? That great and venerable man, lord Cambden, already cited with so much well deserved eulogy, says, that he has never yet been able to form a satisfactory definition. All essays, made towards it, are neither accurate nor satisfactory; yet, such as they are, I shall cite them and animadvert.

Blackstone and Hawkins declare that it is any malicious defamation, with an intent to blacken the reputation of any one, dead or alive.

The criminal quality is its maliciousness. The next ingredient is, that it shall have an intent to defame. I ask, then, if the intent be not the very essence of the crime? It is admitted that the word falsity, when the proceedings are on the statute, must be proved to the jury, because it makes the offence. Why not then the malice, when, to constitute the crime, it must necessarily be implied. In reason there can be no difference.

A libel is, then, a complicated matter of fact and law, with certain things and circumstances to give them a character. If so, then the malice is to be proved. The tendency to provoke is its constituent. Must it not be shown how and in what manner? If this is not to be the case, must every one, who does not panegyrize, be said to be a libeller? Unless the court are disposed to go that extreme length, it is necessary that the malice and intent must be proved. To this, it is certain the definition of lord Coke may, in some degree, be opposed. He does seem to super-add "the breach of the peace." Lord Coke, however, does not give this as a specific definition; and even then the defamatory writing, which he particularizes, includes the question both of intent and malice. The breach of the peace, therefore, is not made the sole, but only one of the qualities. The question is not on the breaking of the peace, but depends on time, manner and circumstances, which must ever be questions of fact for jury determination. I do not advocate breaking the peace: observations may be made on



public men, which are calculated merely to excite the attention of the community to them; to make the people exercise their own functions, which may have no tendency to a breach of the peace, but only to inspection. For surely a man may go far in the way of reflecting on public characters, without the least design of exciting tumult. He may only have it in view, to rouse the nation to vigilance and a due exertion of their right to change their rulers. This, then, being a mere matter of opinion, can it be not a matter for them to judge of, to whom it is addressed? The court, to be sure, may, like a jury, and in common with them, have the legal power and moral discernment to determine on this; yet it does not arise out of the writing, but by adverting to the state of things and circumstances. It, therefore, answers no purpose to say it has a tendency to a breach of the peace.

Lord Loughborough, in the *Parl. Chron.* 644, 657, instances that passages from holy writ may be turned into libels.

Lord Thurlow admits that this may happen, and that time and circumstances may enter into the question. He, it is true, sanctioned the doctrines of our opponents, but allowed time and circumstances to be ingredients; and, strange to say, though these are extrinsic to the record, was of opinion for the old law. Lord Thurlow says, however, that it might be something more than a bare libel. Intimating here, that it may be even treason; and is it not, then, to confess that intent is a matter of fact? If so, who, or where shall be the forum but the jury?

My definition of a libel is, and I give it with all diffidence after the words of lord Camden, my definition then, is this: I would call it a slanderous or ridiculous writing, picture or sign, with a malicious or mischievous design or intent, towards government, magistrates, or individuals. If this definition does not embrace all that may be so called, does it not cover enough for every beneficial purpose of justice? If it have a good intent, it ought not to be a libel, for it then is an inno-

cent transaction; and it ought to have this intent, against which the jury have, in their discretion, to pronounce. It shows itself to us as a sentence of fact. Crime is a matter of fact by the code of our jurisprudence. In my opinion, every specific case is a matter of fact, for the law gives the definition. It is some act in violation of law. When we come to investigate, every crime includes an intent. Murder consists in killing a man with malice prepense. Manslaughter, in doing it without malice, and at the moment of an impulse of passion. Killing may even be justifiable, if not praiseworthy, as in defence of chastity about to be violated. In these cases the crime is defined, and the intent is always the necessary ingredient. The crime is matter of law, as far as definition is concerned; fact, as far as we are to determine its existence.

But it is said the judges have the right, on this fact, to infer the criminal intent, that being matter of law. This is true; but what do we mean by these words, unless the act dependant on, and united with its accessories, such as the law has destined, and which when proved, constitute the crime. But whether the jury are to find it so, with all its qualities, is said to be a question; no act, separate from circumstances, can be criminal, for without these qualities it is not a crime. Thus, as I have before instanced, murder is characterized by being with malice prepense; manslaughter, by being involuntary; justifiable homicide, by having some excuse. Killing, therefore, is not a crime; but it becomes so in consequence of the circumstances annexed. In cases that are, in the general opinion of mankind, exceptions to the explanations I have given, the law contemplates the intent. In duelling, the malice is supposed from the deliberate acts of reflecting, sending a challenge, and appointing the time and place of meeting. Here, it is true, the law implies the intent; but then let it be remembered that it is in consequence of its having previously defined the act, and forbidden its commission. This too is on the principle of natural justice, that no man shall be



the avenger of his own wrongs, especially by a deed, alike interdicted by the laws of God and of man. That, therefore, the intent shall in this case constitute the crime, is because the law has declared it shall be so. It is impossible to separate a crime from the intent. I call on those opposed to us to say what is a libel. To be sure they have told us that it is any scandalous publication, &c. which has a tendency to a breach of the peace. This, indeed, is a broad definition, which must, for the purposes of safety, be reduced to a positive fact, with a criminal intent. In this there is no violation of law; it is a settled maxim, that *mens facit reum; non reus, nisi sit mens rea*. When a man breaks into a house it is the intent that makes him a felon. It must be proved to the jury that it was his intention to steal: they are the judges of whether the intent was such, or whether it was innocent. Then so, I say, should it be here; let the jury determine, as they have the right to do, in all other cases, on the complicated circumstances of fact and intent. It may, as a general and universal rule, be asserted, that the intention is never excluded in the consideration of the crime. The only case resorted to, and which is relied on by the opposite side, (for all the others are built upon it,) to show a contrary doctrine, was a star-chamber decision. To prove how plainly the intent goes to the constituting the crime of libel, the authority cited by the counsel associated with me, is fully in point. In that, the letter written to the father, though (as far as words were concerned,) perfectly a libel, yet having been written for the purpose of reformation, and not with an intent to injure, was held not to amount to a libel. Suppose persons were suspected of forging public papers, and this communicated by letter to the secretary of state, with a good design; still, if the doctrines contended for were to prevail, it would be libellous and punishable, though the party not only did it with the best of motives, but actually saved the state. In madness and idiocy, crimes may be perpetrated; nay, the same malicious intent may



exist, but the crime does not. These things tend to show that the criminality of an act, is matter of fact and law combined, and on which it cannot belong to the exclusive jurisdiction of the court to decide the intent. For the question is, forever, a question of fact.

The criminal intent, says Lord Mansfield, in the dean of St. Asaph's case, is what makes the crime.

Here, that truly great man, for great he was, and no one more really estimates him than I do, yet he might have some biasses on his mind, not extremely favorable to liberty; here, then, he seems to favor the doctrine contended for, but he will be found to be at times contradictory, nay, even opposed to himself. "A criminal intent in doing a thing in itself criminal, without a lawful excuse, is an inference of law." How can that be in itself criminal, which admits of a lawful excuse? Homicide is not in itself a crime, therefore it is not correct to say, a criminal intent can be inferred, because a lawful excuse may be set up. A thing cannot be criminal, which has a lawful excuse, but as it may have a certain quality which constitutes the crime. To be sure you may go on to say, that where the intent bestows the character of criminality on an act indifferent, then it is a matter of fact, and not where the act is bad in itself. But this is begging the question. We contend that no act is criminal, abstracted and divested of its intent. Trespass is not in itself innocent. No man has a right to enter another's land or house. Yet it becomes in this latter case felony only in one point of view, and whether it shall be holden in that point, is a subject of jury determination. Suppose a man should enter the apartments of the king, this, in itself, is harmless, but if he do it with an intent to assassinate, it is treason. To whom must this be made to appear in order to induce conviction? to the jury. Let it rather be said, that crime depends on intent, and intent is one parcel of the fact. Unless, therefore, it can be shown that there is some specific character of libel, that will ap-

ply in all cases, intent, tendency and quality, must all be matters of fact for a jury. There is, therefore, nothing which can be libel, independent of circumstances; nothing which can be so called in opposition to time and circumstances. Lord Loughborough, indeed, in the parliamentary debates on this very subject, to which I have referred the court, admits this to be the case. Lord Mansfield, embarrassed with the truth and strength of the doctrine, endeavors to contrast meaning with intent. He says that the truth may be given in evidence, to show the meaning, but not the intent. If this can be done to show the application where the person is imperfectly described, why not to prove the intent, without which the crime cannot be committed. Whatever is done collaterally must show this, and in all cases collateral facts are for the jury. The intent here, has been likened to the construction of a deed, or any written instrument, in all of which the intent is for the court. But the comparison will not hold; for even there the intent may be inquired of *aliunde*. When you go to qualify and explain, what is this but to decide on the intent by matters of fact? Lord Mansfield is driven into this contradiction, when, on one occasion, he says it is a matter on which the jury may exercise their judgment, and in another, that it is not. I am free to confess, that in difficult cases, it is the duty of a jury to hearken to the directions of a judge, with very great deference. But if the meaning must be either on the face of the libel, or from any thing *aliunde*, then it must be a matter of fact for the jury. That the *quo animo* affects the constitution of libel, cannot be disputed, and must be inquired of by some body. Now unless this is to be tried by the jury, by whom is it to be determined? Will any man say, that in the case in the star-chamber, respecting the letter written to the child's father, the intent was not the reason why it was held innocent, and the *quo animo* not gone into? Did they not then endeavor to prove the guilt by the intent? Now if you are to show things malicious *ali-*

*unde*, you may defend by the same means. The *mens* is the question, and in common parlance it is that, to which we resort to show guilt. 11 Mod. the Queen *vs.* Brown, will explain how it is to be found. Nay, in this very case, when the counsel for the defendant objected to the attorney general's reading passages from the prospectus of the Wasp, and from other numbers, he expressly avowed that he thus acted in order that the jury might see it to be "manifest that the intent of the defendant was malicious." This, I here observe, is a mistake that law officers would not be very apt to slide into. Yet, on this very intent, this malicious intent thus proved to the jury, and on which they founded their verdict, is the court now asked to proceed to judgment. To demonstrate how fully this matter of intent, is by our law a subject of jury determination, suppose the grand jury had, in the present case, returned to the bill *ignoramus*, on what would they have founded their return? Is not this then a precedent, that the *quo animo* is for a jury. If it be necessary only to find the publication, why is not the grand jury competent for the whole? For if the supposition is, that the grand jury may decide on the finding of the bill, surely the petit jury may acquit. If so, then, is the case I have mentioned an important precedent. In *Rex vs. Horne*, an authority that has been justly urged, the principle is allowed. It appears there, that the jury are to exercise their judgment, from the nature of the act, what is its intent. Into a confession of this is lord Mansfield himself driven. *Regina vs. Fuller*, we are told from the other side, was a case on the statute for *scandalum magnatum*. Of this, however, I can find no trace in the books, and there lord Holt repeatedly interrogated as to the truth; would have allowed it to be given in evidence, and directed the jury that, if they did not believe the allegations false, they were not to find the defendant guilty. This then is a decision, as we contend, that not only the intent, but the truth is important to constitute the crime, and nothing has been shown against it. Nay, lord Holt goes on still



further; he bids the jury consider whether the papers have not a tendency to beget sedition, riot and disturbance. Surely this authority, of that great man, demonstrates that intent and tendency, are matters of fact for a jury. This argument will be further strengthened, when I enumerate those cases, where truth has been permitted to be shown. But before I do that, I must examine how far truth is to be given in evidence. This depends on the intent's being a crime. Its being a truth is a reason to infer, that there was no design to injure another. Thus not to decide on it, would be injustice, as it may be material in ascertaining the intent. It is impossible to say that to judge of the quality and nature of an act, the truth is immaterial. It is inherent in the nature of things, that the assertion of truth cannot be a crime. In all systems of law this is a general axiom, but this single instance it is attempted to assert creates an exception, and is therefore an anomaly. If, however, we go on to examine what may be the case that shall be so considered, we cannot find it to be this. If we advert to the Roman law, we shall find that Paulus and Pereizius take a distinction between those truths which relate to private persons, and those in which the public are interested. Vinnius lays it down in the doctrine cited by the associate counsel who last spoke. If then we are to consider this a doctrine to be adopted in all that relates to public men, it ought now to be received. When we advert to the statutes they confirm our positions. These statutes are indisputably declaratory of the early law. We know that a great part of the common law has been, for certainty, reduced to statutes. Can we suppose that the common law did not notice that no punishment was to be inflicted for speaking the truth, when we see a statute thus enacting?

Therefore, the fair reasoning is, that they are declaratory of the common law. That, by our code, falsehood must be the evidence of the libel. If we apply to precedents, they are decidedly for us. In the case cited from 7 D. and E. this is admitted, for there it is

allowed, that the word false is contained in all the ancient forms. This then is a strong argument, for saying that the falsity was, by the common law, considered a necessary ingredient. It is no answer to say, that in declarations for assault we use the words "sticks, staves, &c." When instruments are named, this imports only one or the other which might be used; but when a word by way of epithet, that it means a precise idea, and we are to take it as if introduced for the purpose of explaining the crime. As to the practice on this occasion, we must take various epochs of the English history into consideration. At one time, that the law was as we have shown, is proved by the statutes. At that time the truth was clearly drawn into question, and that since the period of lord Raymond a different practice has prevailed, is no argument against the common law. The authority from the third institute is conclusive, at least satisfactory, to show that it was then necessary to show the words were true. *Et quid, &c. quæ litera in se continet nullam veritatem ideo, &c.* It is to be supposed that the truth in this case was not inquired into, when the want of it, is the reason of the judgment. Unless this had been gone into, the court would not, nor could not, have spoken to it. The insertion of that then, is a strong argument that this was the old law, and it shows us, what that law was. In the case of the seven bishops, they were allowed to go into all the evidence they wanted. The court permitted them to read every thing to show it.

On that occasion, Halloway and all agreed as to the admissibility of the truth. But this case is important in another view, as it shows the intent ought to be inquired into, for the bishops might have done it either with a seditious or an innocent motive. They declare that by the law they could not do the act required. They exculpated themselves by an appeal to their consciences. This shows the necessity of inquiring into the intent of the act.

In *Rex vs. Fuller*, this very atrocious offender was

indicted for a most infamous libel, and yet lord Holt, at every breath asked him, can you prove the truth. At the time then, when this was done, there were some things in favor of the truth. It stands then a precedent for what we contend. I shall now notice some intermediate authorities between that day and those in which a contrary principle has been endeavored to be supported. It is true that the doctrine originated in one of the most oppressive institutions that ever existed; in a court where oppressions roused the people to demand its abolition, whose horrid judgments cannot be read without freezing the blood in one's veins. This is not used as declamation but as argument. If doctrine tends to trample on the liberty of the press, and if we see it coming from a foul source, it is enough to warn us against polluting the stream of our own jurisprudence. It is not true that it was abolished merely for not using the intervention of juries, or because it proceeded *ex parte*, though that, God knows, would have been reason enough, or because its functions were discharged by the court of king's bench. It was because its decisions were cruel and tyrannical, because it bore down the liberties of the people and inflicted the most sanguinary punishments. It is impossible to read its sentences without feeling indignation against it. This will prove why there should not be a paramount tribunal to judge of these matters.

Want's case is the first we find on this subject: but even then we do not meet the broad definition of lord Coke, in the case *de famosis libellis*. I do not deny this doctrine of the immateriality of the truth as a universal negative to a publication's being libellous, though true. But still I do say, that in no case, may you not show the intent. For, whether the truth be a justification, will depend on the motives with which it was published.

Personal defects can be made public only to make a man disliked. Here then it will not be excused; it might, however, be given in evidence to show the libellous degree. Still however it is a subject of inquiry.



There may be a fair and honest exposure. But if he uses the weapon of truth wantonly; if for the purpose of disturbing the peace of families; if for relating that which does not appertain to official conduct, so far we say the doctrine of our opponents is correct. If their expressions are, that libellers may be punished though the matter contained in the libel be true, in these I agree. I confess that the truth is not material as a broad proposition respecting libels. But that the truth cannot be material in any respect, is contrary to the nature of things. No tribunal, no codes, no systems can repeal or impair this law of God, for by his eternal laws it is inherent in the nature of things. We first find this large and broad position to the contrary in 5 Rep. And here it is to be noticed, that when lord Coke himself was in office, when he was attorney general, and allowed to give his own opinion, he determines the truth to be material. But when he gets into that court, and on that bench, which had pronounced against it, when he occupies a star-chamber seat, then he declares it is immaterial. I do not mention this as derogating from lord Coke, for, to be sure, he may be said to have yielded; but this I say, is the first case on this point, in which he seems to be of a contrary opinion. We do not, in every respect, contend even against his last ideas, we only assert that the truth may be given in evidence. But this we allow is against the subsequent authorities, which, in this respect, overturn the former precedents. These latter, however, are contrary to the common law; to the principles of justice and of truth. The doctrine, that juries shall not judge on the whole matter of law and fact, or the intent and tendency of the publication, is not to be found in the cases before the time of lord Raymond; and it is contrary to the spirit of our law, because it may prevent them from determining on what may, perhaps, be within their own knowledge. It was only by lord Raymond, that this was first set up and acted upon, and this has been followed by lord Mansfield and his successors. Here, then, have been a series of precedents

against us. Blackstone too says, that the truth may not be given in evidence so as to justify; and so, with the qualifications I have before mentioned, do we. Prior, indeed, to his time, lord Holt had laid down the law, in one or two cases, in conformity to that of the other side, and latter times have given this a currency by a coincidence of precedents in its favor. A reflection may, perhaps, be here indulged, that, from what I have before remarked on lord Coke, it is frequent for men to forget sound principles, and condemn the points for which they have contended. Of this, the very case of the seven bishops is an example, when those, who there maintained the principles for which we contend, supplanted the persons then in power, they were ready to go the whole length of the doctrine, that the truth could not be given in evidence on a libel. This is an admonition that ought at all times to be attended to; that at all times men are disposed to forward principles to support themselves. The authority of Paley has been adduced, if indeed he may be called an authority. That moral philosopher considers every thing as slanderous libels, whether true or false, if published with motives of malice.

In these cases he does not consider the truth a justification. Nor do we; we do not say that it is, alone, always a justification of the act; and this we say, consistent with sound morality, is good law and good sense. On what ought a court to decide on such an occasion as this? Shall they be shackled by precedents, weakened in that very country where they were formed? Or rather, shall they not say, that we will trace the law up to its source? We consider, they might say, these precedents as only some extraneous bodies engrafted on the old trunk; and as such I believe they ought to be considered. I am inclined to think courts may go thus far, for it is absolutely essential to right and security that the truth should be admitted. To be sure, this may lead to the purposes suggested. But my reply is, that government is to be

Truth is  
a justify



thus treated, if it furnish reasons for calumny. I affirm, that, in the general course of things, the disclosure of truth is right and prudent, when liable to the checks I have been willing it should receive as an object of animadversion.

It cannot be dangerous to government, though it may work partial difficulties. If it be not allowed, they will stand liable to encroachments on their rights. It is evident, that if you cannot apply this mitigated doctrine, for which I speak, to the cases of libels here, you must forever remain ignorant of what your rulers do. I never can think this ought to be; I never did think the truth was a crime; I am glad the day is come in which it is to be decided; for my soul has ever abhorred the thought, that a free man dared not speak the truth; I have forever rejoiced when this question has been brought forward.

I come now to examine the second branch of this inquiry—the different provinces of the court and the jury. I will introduce this subject by observing, that the trial by jury has been considered, in the system of English jurisprudence, as the palladium of public and private liberty. In all the political disputes of that country, this has been deemed the barrier to secure the subjects from oppression. If, in that country, juries are to answer this end, if they are to protect from the weight of state prosecutions, they must have this power of judging of the intent, in order to perform their functions; they could not otherwise answer the ends of their institution. For, under this dangerous refinement, of leaving them to decide only the fact of composing and publishing any thing on which they may decide, may be made a libel. I do not deny the well known maxim, that to matters of fact, the jury, and to matters of law, the judges shall answer. I do not deny this, because it is not necessary for the purposes of this or any other case, that it should be denied. I say, with this complicated explanation, I have before given of the manner in which the intent is necessarily



interwoven in the fact, the court has the general cognizance of the law. In all cases of ancient proceedings the question of law must have been presented.

It was in civil cases alone that an attaint would lie. They have, it is said, the power to decide in criminal, on the law and the fact. They have then the right, because they cannot be restricted in its exercise; and, in politics, power and right are equivalent. To prove it, what shall we say to this case? Suppose the legislature to have laid a tax, which, by the constitution, they certainly are entitled to impose, yet still the legislature may be guilty of oppression; but who can prevent them, or say they have not authority to raise taxes? Legal power, then, is the decisive effect of certain acts without control. It is agreed, that the jury may decide against the direction of the court, and that their verdict of acquittal cannot be impeached, but must have its effect. This, then, I take to be the criterion, that the constitution has lodged the power with them, and they have the right to exercise it. For this I could cite authorities. It is nothing to say, in opposition to this, that they, if they act wrong, are to answer between God and their consciences. This may be said of the legislature, and yet, nevertheless, they have the power and the right of taxation. I do not mean to admit, that it would be proper for jurors thus to conduct themselves, but only to show that the jury do possess the legal right of determining on the law and the fact. What, then, do I conceive to be true doctrine? That in the general distribution of power in our constitution, it is the province of the jury to speak to fact, yet, in criminal cases, the consequences and tendency of acts, the law and the fact are always blended. As far as the safety of the citizen is concerned, it is necessary that the jury shall be permitted to speak to both. How, then, does the question stand? Certainly not without hazard; because, inasmuch as in the general distribution of power, the jury are to be confined to fact, they ought not wantonly to depart from the advice of the court; they ought to receive it,

if there be not strong and valid reasons to the contrary; if there be, they should reject. To go beyond this is to go too far. Because, it is to say, when they are obliged to decide, by their oath, according to the evidence, they are bound to follow the words of the judge. After they are satisfied, from him, what the law is, they have a right to apply the definition. It is convenient that it should be so. If they are convinced that the law is as stated, let them pronounce him guilty; but never let them leave that guilt for the judge; because, if they do, the victim may be offered up, and the defendant gone. Will any one say, that under forms of law we may commit homicide? Will any directions from any judge excuse them? I am free to say, I would die on the rack, were I to sit as a juror, rather than confirm such a doctrine, by condemning the man I thought deserved to be acquitted; and yet I would respect the opinion of the judge, from which, however, I should deem myself at liberty to depart, and this I believe to be the theory of our law.

These are the propositions I shall endeavor to maintain. I have little more to do than examine how far precedents accord with principles, and whether any establish a contrary doctrine. I do not know that it is necessary to do more than has already been done by my associate counsel, and yet perhaps I should not complete my duty without adverting to what has fallen, on this point, from our opponents. There is not one of the ancient precedents in which our doctrine has not in general prevailed, and it is, indeed, to be traced down to one of a modern date. The case of the seven bishops is that to which I allude. There it was permitted to go into the truth, and all the court submitted the question to the jury. This case deserves particular attention. If, on the one hand, it was decided at a time when the nation was considerably agitated, it was, on the other hand, at a time when great constitutional precedents and points were discussed and resolved. The great one was, the power of the jury; and this power was sub-



mitted to, to extricate the people, for the salvation of the nation, from the tyranny with which they were then oppressed. This was one of the reasons which brought about their glorious revolution, and which, perhaps, tended to the maturing those principles which have given us ours. This ought to be considered as a landmark to our liberties, as a pillar which points out to us on what the principles of our liberty ought to rest; particularly so if we examine it as to its nature, and the nature of the attempts then made to set up and support the endeavors to construe an act of duty a libel—a deed, in which conscience did not permit those reverend characters to act, in any other way than what they did, a respect to which they held a bounden duty. It is a precedent then on which we should in every way fasten ourselves. The case of Fuller is of minor importance. Yet that is one in which lord Holt called on the defendant to enter into the truth. In the *King vs. Tutchin*, lord Holt expressly tells the jury, you are to consider whether the tendency of this writing be not to criminate the administration; you, the jury, are to decide on this. Owen's case is to the same effect. There lord Cambden was of counsel, and in the discussion, in the house of lords, he tells us, and surely his testimony is good, that being of counsel for the defendant, he was permitted to urge to the jury a cognizance of the whole matter of libel: that in the case of Shepherd, where, by his official situation, he was called on to prosecute for the crown, where the interests of government called on him to maintain an opposite doctrine, yet then he insisted for a verdict on the whole matter, from the consideration of the jury. In the *King vs. Horne*, lord Mansfield himself tells the jury they have a right to exercise their judgment from the nature of the intent. This surely then, is a precedent down to a late period. It is not, however, to be denied, that there is a series of precedents on the other side. But, as far as precedents of this kind can be supported, they can rest on precedents alone, for the fundamental rights of



juries show, that, as by their power, they can affect a question of this nature, so, politically speaking, they have the right. To ascertain this, it is necessary to inquire, whether this law, now contended for, uniformly and invariably formed the practice of all the judges in Westminster hall. For, if so, then an argument may, with more propriety, be raised; but if it was disputed, then it is to be doubted. Precedents ought to be such as are universally acknowledged, and this, if we are to credit the highest authority, was not the invariable practice. Lord Loughborough says, that his practice was the other way. He declares that he invariably left the whole to the jury; and lord Camden gives us to understand the same thing. Here, then, is proof that it was not universally acquiesced in, and this, by some of the most respected characters that ever sat on a bench. Can we call this a settled practice—a practice which is contradicted by other precedents? Have they not varied? I consider nothing but a uniform course of precedents, so established that the judges invariably conform to it in their judicial conduct, as forming a precedent. When this is not the case, we must examine the precedent, and see how far it is conformable to principles of general law. If then they have not that character of uniformity, which gives force to precedents, they are not to be regarded, for they are too much opposed to fundamental principles. The court may, therefore, disregard them, and say the law was never thus settled. It was a mere floating of litigated questions. Different conduct was pursued by different men, and, therefore, the court is at liberty to examine the propriety of all; and if it be convenient that a contrary mode should be adopted, we ought to examine into what has been done, for we have a right so to do, and it is our sacred duty. When we pass from this to the declaratory law of Great Britain, the whole argument is enforced by one of the first authority. I do not consider it as binding, but as an evidence of the common law. If so, I see not why we may not now hold it as evidence, of an-

other evidence, that the law had not been settled by a regular course of judicial precedents. On all the debates on this question, it is denied to have been so settled. It must then be confessed that it was so; the law was one thing, and the practice another; that to put it out of doubt, was the end and object of Mr. Fox's bill. Therefore, it is in evidence that the law was not settled in that country. I notice another fact, or historical evidence of this; it is what was mentioned by lord Lansdowne, in the very debates to which I have before alluded. It is, that twenty years before, a similar act was brought forward and dropped. Here then is a matter of fact, to show that, in the consideration of that nation, the doctrines of lord Mansfield were never palatable nor settled, and that the opinions of judges and lawyers, were considered by many, as not the law of the land. Let it be recollected too, that with that nation the administration of justice, in the last resort, is in the house of lords. That being so, it gives extreme weight to a declaratory act, as it shows the sense of the highest branch of judicature of that country. It is in evidence, that what we contend for was, and had been the law, and never was otherwise settled. It is a very honorable thing to that country, in a case where party passions had been excited to a very great height, to see that all united to bring it in. It was first introduced by Mr. Fox; the principal officers of the crown acquiesced; the prime minister gave it his support, and in this they were aided by many of the great law lords. All parties concurred in declaring the principles of that act to be the law; and not only does the form prove it to be declaratory, but when the court read the debates on that subject, they will see this to be the fact. Adding the word enacted, to a bill, does not vary the conclusion of its being declaratory. The word enacted is commonly superadded, but the word declared, is never used, but when it is intended that the act shall be considered as declaratory; and, when they insert the word declare, it is because they deem it important that it should be



so understood. This I deem conclusive evidence of the intent. Thus also it was understood by all the judges, except lord Kenyon, and he does not say that it was not declaratory. To be sure he makes use of some expressions, that look that way; such as, "that the act had varied the old law." But not one word to show, that it was not intended, by parliament, to be a declaratory law. But it would not be surprising that lord Kenyon, who opposed the passage of the act, should, in a judicial decision, still adhere to his old ideas. This, however, does not affect the evidence which arises from the words of the act. I join in issue then, whether this be sufficient evidence to the court. For I contend, that notwithstanding the authority of lord Kenyon, and the cases on the other side, the conclusions they maintain would be unfair. For, if these conclusions necessarily tend to the subversion of fundamental principles, though they be warranted by precedents, still the precedents ought not to weigh. But should they have settled the law by their precedents, still this court will admit any evidence to show that the facts are otherwise, and the law never was as they have settled it. In this case then, I say, as matters of evidence, these precedents shall not prevail, and shall not have any effect. In practice, on this declaratory act, they have gone into a construction important to our argument. But, previously to entering into this, I shall make one observation, to show the nature of this act to be declaratory, the recital states it to be so.

*Spencer, Attorney General*—The whole matter in issue are the words.

*Hamilton*—Is it to be doubted that every general issue includes law and fact? Not a case in our criminal code in which it is otherwise. The construction, the publication, the meaning of the innuendoes, the intent and design, are all involved in the question of libel, and to be decided, on the plea of not guilty, which puts the whole matter in issue. It is, therefore, a subtlety to say, that the fact and law are not in issue. There can



be no distinction taken even by judges, between libels and other points. But will it be said that when this question was before the parliament, whether the law and fact should be in issue, that the parliament did not mean to give the power to decide on both? It is a mere cavil to say, that the act did not mean to decide on this very point. The opposition of the twelve judges has been much insisted on. But in my opinion they have given up the point as to the right of the jury to decide on the intent. They in some part of their answer assert the exclusive power of the court; they deny in terms the power of the jury to decide on the whole. But when pressed on this point as to a letter of a treasonable nature, how do they conclude? why the very reverse of all this. Here then we see the hardship, into which the best of men are driven, when compelled to support a paradox. Can the jury do it with power, and without right? When we say of any forum that it can do, and may hazard the doing a thing, we admit the legal power to do it. What is meant by the word hazard? If they choose to do it, they have then the legal right. For legal power includes the legal right. This is really only a question of words. But in the exercise of this right, moral ideas are no doubt to restrain; for the conscience ought to decide between the charge, and the evidence which ought to prevail, one side or the other. The moment, however, that question, as to the power is admitted, the whole argument is given up. I consider the judges driven to yield up, at the conclusion of their opinion, that point, for which they had, in the former parts, contended. Thus then stands the matter, on English conduct and on English precedents. Let us see if any thing in the annals of America, will further the argument. Zenger's case has been mentioned as an authority. A decision in a factious period, and reprobated at the very time. A single precedent never forms the law. If in England it was fluctuating in an English court, can a colonial judge, of a remote colony, ever set-

tle it? He cannot fix, in New York, what was not fixed in Great Britain. It was merely one more precedent to a certain course of practice. But because a colonial governor, exercising judicial power, subordinate to the judges of the mother country, decides in this way, can it be said that he can establish the law, and that he has, by a solitary precedent, fixed, what his superior could not? The most solemn decisions of the court of king's bench are at one time made, and at another time overruled. Why are our courts to be bound down by the weight of only one precedent? Is a precedent, like the laws of the Medes and Persians, never to be changed? This is to make a colonial precedent, of more weight than is in England allowed to a precedent of Westminster Hall. To pursue the precedents, more emphatically our own, let us advert to the sedition law, branded indeed with epithets the most odious, but which will one day be pronounced a valuable feature in our national character. In this we find not only the intent, but the truth may be submitted to the jury, and that even in a justificatory manner. This, I affirm, was on common law principles. It would, however, be a long detail to investigate the applicability of the common law to the constitution of the United States. It is evident, however, that parts of it use a language which refers to former principles. The *habeas corpus* is mentioned, and as to treason, it adopts the very words of the common law. Not even the legislature of the union can change it. Congress itself cannot make constructive, or new treasons. Such is the general tenor of the constitution of the United States, that it evidently looks to antecedent law. What is, on this point, the great body of the common law? Natural law and natural reason applied to the purposes of society. What are the English courts now doing but adopting natural law?

What have the court done here? Applied moral law to constitutional principles, and thus the judges have confirmed this construction of the common law; and therefore, I say, by our constitution it is



said, the truth may be given in evidence. In vain is it to be replied that some committee met, and in their report, gave it the name of amendment. For when the act says declared, I say the highest legislative body in this country, have declared that the common law is, that the truth shall be given in evidence, and this I urge as a proof of what that common law is. On this point a fatal doctrine would be introduced, if we were to deny the common law to be in force according to our federal constitution. Some circumstances have doubtless weakened my position. Impeachments of an extraordinary nature, have echoed through the land, charging as crimes things unknown; and, although our judges, according to that constitution, must appeal to the definitions of the common law for treasons, crimes and misdemeanors. This no doubt was that no vague words might be used. If then we discharge all evidence of the common law, they may be pronounced guilty *ad libitum*: and the crime and offence being at once at their will, there would be an end of that constitution.

By analogy, a similar construction may be made of our own constitution, and our judges thus got rid of. This may be of the most dangerous consequences. It admonishes us, to use, with caution, these arguments against the common law; to take care how we throw down this barrier, which may secure the men we have placed in power; to guard against a spirit of faction, that great bane to community, that mortal poison to our land. It is considered by all great men, as the natural disease of our form of government, and, therefore, we ought to be careful to restrain that spirit. We have been careful, that when one party comes in, it shall not be able to break down and bear away the others. If this be not so, in vain have we made constitutions; for, if it be not so, then we must go into anarchy, and from thence to despotism and to a master. Against this I know there is an almost insurmountable obstacle in the spirit of the people. They would not submit to be thus enslaved. Every tongue,



every arm would be uplifted against it; they would resist, and resist, and resist, till they hurled from their seats those who dared make the attempt. To watch the progress of such endeavors is the office of a free press: to give us early alarm, and put us on our guard against the encroachments of power. This, then, is a right of the utmost importance; one for which, instead of yielding it up, we ought rather to spill our blood. Going on, however, to precedents, I find another, in the words of chief justice Jay, when pronouncing the law on this subject. The jury are, in the passage already cited, told, the law and the fact is for their determination; I find him telling them that it is their right. This admits of no qualification. The little, miserable conduct of the judge in Zenger's case, when set against this, will kick the beam; and it will be seen that even the twelve judges do not set up, with deference however to their known abilities, that system now insisted on. If the doctrine, for which we contend, is true in regard to treason and murder, it is equally true in respect to libel. For there is the great danger. Never can tyranny be introduced into this country by arms; these can never get rid of a popular spirit of inquiry; the only way to crush it down is by a servile tribunal. It is only by the abuse of the forms of justice that we can be enslaved. An army never can do it. For ages it can never be attempted. The spirit of the country, with arms in their hands, and disciplined as a militia, would render it impossible. Every pretence, that liberty can be thus invaded, is idle declamation. It is not to be endangered by a few thousands of miserable, pitiful military. It is not thus that the liberty of this country is to be destroyed. It is to be subverted only by a pretence of adhering to all the forms of law, and yet, by breaking down the substance of our liberties; by devoting a wretched, but honest man, as the victim of a nominal trial. It is not by murder, by an open and public execution, that he would be taken off. The sight of this, of a fellow-citizen's blood, would at first beget sympathy; this would rouse into action.

and the people, in the madness of their revenge, would break, on the heads of their oppressors, the chains they had destined for others.

One argument was stated to the court, of a most technical and precise kind. It was that which relates to putting on the record a part only of the libel. That on this, no writ of error would lie. What was the answer given? That it could not be presumed judges could be so unjust. Why, it requires neither prejudice nor injustice, it may be matter of opinion. The argument goes to assert, that we are to take for granted the infallibility of our judges. The court must see that some better reason must be given; that it must be shown that this consequence cannot ensue. If not, it is decisive against the argument. Surely, this question deserves a further investigation. Very truly and righteously was it once the intention of the attorney-general, that the truth should have been given in evidence. It is desirable that there should be judicial grounds to send it back again to a jury. For surely it is not an immaterial thing, that a high official character should be capable of saying any thing against the father of this country.

It is important to have it known to the men of our country, to us all, whether it be true or false; it is important to the reputation of him against whom the charge is made, that it should be examined. It will be a glorious triumph for truth, it will be happy to give it a fair chance of being brought forward; an opportunity, in case of another course of things, to say, that the truth stands a chance of being the criterion of justice. Notwithstanding, however, the contrary is asserted to be the doctrine of the English courts, I am, I confess, happy to hear that the freedom of the English is allowed; that a nation, with king, lords and commons, can be free. I do not mean to enter into a comparison between the freedom of the two countries. But the attorney-general has taken vast pains to celebrate lord Manfield's character. Never, till now, did I hear that his reputation was high in republican esti-

mation; never, till now, did I consider him as a model for republican imitation. I do not mean, however, to detract from the fame of that truly great man, but, only conceived his sentiments were not those fit for a republic. No man more truly reveres his exalted fame than myself; if he had his faults, he had his virtues; and I would not only tread lightly on his ashes, but drop a tear as I passed by. He, indeed, seems to have been the parent of the doctrines on the other side. Such, however, we trust, will be proved not to be the doctrines of the common law, nor of this country, and that, in proof of this, a new trial will be granted.



# SPEECH OF JOSEPH HOPKINSON,

IN THE TRIAL OF

SAMUEL CHASE,

AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE  
UNITED STATES, IMPEACHED BY THE HOUSE OF REPRESENTATIVES,  
FOR HIGH CRIMES AND MISDEMEANORS,  
BEFORE THE SENATE OF THE UNITED STATES, 1805.



MR. PRESIDENT,

WE cannot remind you, and this honorable court, as our opponents have so frequently done, that we address you in behalf of the majesty of the people. We appear for an ancient and infirm man, whose better days have been worn out in the service of that country which now degrades him; and who has nothing to promise you for an honorable acquittal but the approbation of your own consciences. We are happy, however, to concur with the honorable managers in one point—I mean the importance they are disposed to give to this cause. In every relation and aspect in which it can be viewed, it is, indeed, of infinite importance. It is important to the respondent to the full amount of his good name and reputation, and of that little portion of that happiness, the small residue of his life may afford. It is important to you, senators and judges, inasmuch as you value the judgment which posterity shall pass upon the proceedings of this day. It is important to our country, as she estimates her character for sound, dignified and impartial justice in the eyes of a judging world. The little, busy vortex that plays immediately round the scene of action, considers this proceeding merely as the trial of judge Chase, and gazes upon him as the only person interested in the result. This is a false and imperfect

view of the case. It is not the trial of judge Chase alone. It is a trial between him and his country: and that country is as dearly interested as the judge can be, in a fair and impartial investigation of the case, and in a just and honest decision of it. There is yet another dread tribunal to which we should not be inattentive. We should look to it with solemn impressions of respect. It is posterity—the race of men that will come after us. When all the false glare and false importance of the times shall pass away—when things shall settle down into a state of placid tranquillity and lose that bustling motion that deceives with false appearances—when you, most honorable senators, who sit here to judge, as well as the respondent, who sits here to be judged, shall alike rest in the silence of the tomb, then comes the faithful, the scrutinizing historian, who, without fear or favor, will record this transaction; then comes a just and impartial posterity, who, without regard to persons or to dignities, will decide upon your decision. Then, I trust, the high honor and integrity of this court, will stand recorded in the pure language of deserved praise, and this day will be remembered in the annals of our land, as honorable to the respondent, to his judges, and to the justice of our country.

We have heard, sir, from the honorable managers who have addressed you, many harsh expressions. I hope, sir, they will do no harm. We have been told of the respondent's unholy sins, which even the heavenly expectation of sincere repentance cannot wash away; we have been told of his volumes of guilt, every page of which calls loudly for punishment. This sort of language but pursues the same spirit of asperity and reproach, which was begun in the replication to our answer. But we come here, sir, not to complain of any thing; we come, expecting to bear and to forbear much. It does, indeed, seem to me, that the replication, filed by the honorable managers, on behalf of the House of Representatives and of all the people, carries with it more acrimony than either the occasion

or their dignity demanded. It may be said, they have resorted for it to English precedent, and framed it from the replication filed in the celebrated case of Warren Hastings. There is, however, no similarity between that case and ours. Precedents might have been found more mild in their character, and more adapted to the circumstances of our case. The impeachment of Hastings was not instituted on a petty catalogue of frivolous occurrences, more calculated to excite ridicule than apprehension, but for the alleged murder of princes and plunder of empires. If, however, the choice of this case, as a precedent for our pleadings, has exposed us to some unpleasant expressions, it also furnishes to us abundance of consolation and hope. There, the most splendid talents, that ever adorned the British nation, were strained to their utmost exertion to crush the devoted victim of malignant persecution. But in vain; the stern integrity, the enlightened perception, the immoveable justice of his judges, stood as a barrier between him and destruction, and safely protected him from the fury of the storm. So, I trust in God, it will be with us.

In England, the impeachment of a judge is a rare occurrence. I recollect but two in half a century. But in our country, boasting of its superior purity and virtue, and declaiming ever against the vice, venality and corruption of the old world, seven judges have been prosecuted criminally in about two years. A melancholy proof either of extreme and unequalled corruption in our judiciary or of strange and persecuting times among us.

The first proper object of our inquiries in this case, is, to ascertain, with proper precision, what acts or offences of a public officer, are the objects of impeachment. This question meets us at the very threshold of the case. If it shall appear that the charges exhibited in these articles of impeachment are not, even if true, the constitutional subjects of impeachment; if it shall turn out, on the investigation, that the judge has really fallen into error, mistake or indiscretion,



yet if he stands acquitted in proof of any such acts as by the law of the land are impeachable offences, he stands entitled to discharge on his trial. This proceeding by impeachment, is a mode of trial created and defined by the constitution of our country; and by this the court is exclusively bound. To the constitution, then, we must exclusively look to discover what is or is not impeachable. We shall there find the whole proceeding distinctly marked out; and every thing designated and properly distributed, necessary in the construction of a court of criminal jurisdiction. We shall find, first, who shall originate or present an impeachment; second, who shall try it; third, for what offences it may be used; fourth, what is the punishment on conviction. The first of these points is provided for in the second section of the first article of the constitution, where it is declared that "the House of Representatives shall have the sole power of impeachment." This power corresponds with that of a grand jury to find a presentment or indictment. In the third section of the same article, the court is provided before whom the impeachment, thus originated, shall be tried—"the senate shall have the sole power to try all impeachments." And the fourth section of the second article points out and describes the offences intended to be impeachable, and the punishment which is to follow conviction; subject to a limitation in the third section of the first article.

Have any facts, then, been given in evidence against the respondent, which make him liable to be proceeded against by this high process of impeachment? What are the offences? What is the constitutional description of those official acts, for which a public officer may be arraigned before this high court? In the fourth section of the second article of the constitution it is declared, that "the President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." Treason or bribery is not alleged against

us on this occasion. Our offences, then, must come under the general description of "high crimes and misdemeanors," or we are not impeachable by the constitution of the United States. I offer it as a position I shall rely upon in my argument, that no judge can be impeached and removed from office for any act or offence for which he could not be indicted. It must be, by law, an indictable offence. One of the gentlemen, indeed, who conduct this prosecution, (Mr. Campbell,) contends for the reverse of this proposition, and holds, that, for such official acts as are the subject of impeachment, no indictment will lie or can be maintained. For, says he, it would involve us in this monstrous oppression and absurdity, that a man might be twice punished for the same offence, once by impeachment and then by indictment. And so most surely he may; and the limitation of the punishment, on impeachment, takes away the injustice and oppression the gentleman dreads. A slight attention to the subject will show the fallacy of this gentleman's doctrine. If the absurdity and oppression he fears will really ensue, on indicting a man for the same offence, for which he has already been impeached, they must be charged to the constitution itself, which, in the third section of the first article, after limiting the extent of the judgment, in cases of impeachment, goes on to declare that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law." The idea of the honorable manager is, that, for acts done in the course of official duty, a judge must be proceeded against exclusively by impeachment; and that no indictment will lie in such case. The incorrectness of this notion appears not only from a reference to the constitution, but to the known law of England also. I will remind you of a case, stated, I believe, in the elementary books of the law, in which it is said, that if a judge undertakes, of his own authority, to change the mode of punishment, prescribed by law, for any crime, he is indictable; for instance, should he sen-



tence a man to be beheaded, when the law directed him to be hanged, the judge is guilty of murder, and may be accordingly indicted. When, sir, I contend, that in order to sustain an impeachment, an offence must be proved upon the respondent, which would support an indictment, I do not mean to be understood as admitting, that the converse of the proposition is true; that is, that every act or offence is impeachable, which is indictable. Far from it. A man may be indictable for many violations of positive law, which evince no *mala mens*, no corrupt heart or intention, but which would not be the ground of an impeachment. I will instance the case of an assault, which is an indictable offence, but will not surely be pretended to be an impeachable offence, for which a judge may be removed from office. It is true, that the second section of the first article, which gives the House of Representatives the sole power of impeachment, does not, in terms, limit the exercise of that power. But its obvious meaning is, not, in that place, to describe the kind of acts, which are to be subjects of impeachment, but merely to declare in what branch of the government it shall commence. The House of Representatives has the power of impeachment; but for what they are to impeach, in what cases they may exercise this delegated power, depends on other parts of the constitution, and not on their opinion, whim or caprice. The whole system of impeachment must be taken together, and not in disjointed parts; and if we find one part of the constitution declaring who shall commence an impeachment, we find other parts of it declaring who shall try it, and what acts and what persons are constitutional subjects of this mode of trial. The power of impeachment is with the House of Representatives; but only for impeachable offences. They are to proceed against the offence in this way, when it is committed, but not to create the offence, and make any act criminal and impeachable at their will and pleasure. What is an offence, is a question to be decided by the constitution and the law, not by the opinion of



a single branch of the legislature: and when the offence, thus described by the constitution or the law, has been committed, then, and not until then, has the House of Representatives power to impeach the offender. So a grand jury possesses the sole power to indict; but in the exercise of this power, they are bound by positive law, and do not assume, under this general power, to make any thing indictable which they might disapprove. If it were so, we should, indeed, have a strange, unsettled and dangerous penal code. No man could walk in safety, but would be at the mercy of the caprice of every grand jury that might be summoned; and that would be crime to-morrow which is innocent to day.

What part of the constitution then declares any of the acts, charged and proved upon judge Chase, even in the worst aspect, to be impeachable? He has not been guilty of bribery or corruption; he is not charged with them. Has he then been guilty of "other high crimes and misdemeanors?" In an instrument so sacred as the constitution, I presume every word must have its full and fair meaning. It is not then only for crimes and misdemeanors that a judge is impeachable, but it must be for high crimes and misdemeanors. Although this qualifying adjective "high" immediately precedes and is directly attached to the word "crimes," yet from the evident intention of the constitution and upon a just grammatical construction, it must be also applied to "misdemeanors." The repetition of this adjective would have injured the harmony of the sentence without adding any thing to its perspicuity. How would this be in common parlance? Suppose it should be said that at this trial there are attending many ladies and gentlemen. Would it be doubted that the adjective many applies to gentlemen as well as ladies, although not repeated. Or if there is any thing peculiar in this respect in this word "high," I will suppose it were said, that among the auditors there are men of high rank and station. Would it not be as well understood as if

it were said, that men of high rank and high station are here? There is surely no difference. So in the constitution it is said, that "a regular statement of the receipts and expenditures of all public money shall be published from time to time." Is not the account to be regular as well as the statement? I should have deemed it unnecessary to have spent a word on so plain a point, had I not understood that a difficulty would probably be made upon it. If my construction of this part of the constitution be not admitted, and the adjective "high" be given exclusively to "crimes" and denied to "misdemeanors," this strange absurdity must ensue—that when an officer of the government is impeached for a crime, he cannot be convicted unless it proves to be a high crime; but he may nevertheless be convicted of a misdemeanor of the most petty grade. Observe, sir, the crimes with which these "other high crimes" are classed in the constitution, and we may learn something of their character. They stand in connexion with "bribery and corruption;" tried in the same manner and subject to the same penalties. But if we are to lose the force and meaning of the word "high" in relation to misdemeanors, and this description of offences must be governed by the mere meaning of the term "misdemeanors," without deriving any grade from the adjective, still my position remains unimpaired, that the offence, whatever it is, which is the ground of impeachment, must be such a one as would support an indictment. "Misdemeanor" is a legal and technical term, well understood and defined in law; and in the construction of a legal instrument we must give to words their legal significations; a misdemeanor or a crime, for in their just and proper acceptation they are synonymous terms, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. By this test, let the conduct of the respondent be tried, and, by it, let him stand justified or condemned.

Does, not, sir, the court, provided by the constitution for the trial of an impeachment, give us some idea



of the grade of offences intended for its jurisdiction? Look around you, sir, upon this awful tribunal of justice; is it not high and dignified, collecting within itself the justice and majesty of the American people? Was such a court created, does such a court sit to scan and punish paltry errors and indiscretions too insignificant to have a name in the penal code, too paltry for the notice of a court of quarter sessions? This is, indeed, employing an elephant to remove an atom too minute for the grasp of an insect. Is the senate of the United States solemnly convened and held together in the presence of the nation to fix a standard of politeness in a judge, and mark the precincts of judicial decorum? The honorable gentleman who opened the prosecution, (Mr. Randolph,) has contended for a contrary doctrine, and held that many things are impeachable that are not indictable. To illustrate his position, he stated the cases of habitual drunkenness and profane swearing on the bench, which he held to be objects of impeachment and not of indictment. I do not desire to impose my opinions on this court as of any value. But surely I could not hesitate to say that both of the cases, put by the gentleman, would be indictable. Is there not known to us a class of offences, not provided for indeed by the letter of any statute, but which come under the general protection which the law gives to virtue, decency and morals in society. Any act which is *contra bonos mores* is indictable as such. And it is so, not by act of Congress, but by the pure and wholesome mandates of that common law, which some men would madly drive from our jurisprudence, but which I most sincerely pray may live forever.

If I am correct in my position, that nothing is impeachable that is not also indictable, for what acts then may a man be indicted? May it be on the mere caprice or opinion of any ten, twenty or one hundred men in the community; or must it not be on some known law of the society in which he resides? It must unquestionably be for some offence either of



omission or commission against some statute of the United States, or some statute of a particular state, or against the provision of the common law. Against which of these has the respondent offended? What law, of any of the descriptions I have mentioned, has he violated? By what is he to be judged, by what is he to be justified or condemned, if not by some known law of the country? And if no such law is brought upon his case—if no such violation rises on this day of trial in judgment against him, why stands he here at this bar as a criminal? Whom has he offended? The House of Representatives—and is he impeached for this? I maintain as a most important and indispensable principle, that no man should be criminally accused, no man can be criminally condemned, but for the violation of some known law by which he is bound to govern himself. Nothing is so necessary to justice and to safety as that the criminal code should be certain and known. Let the judge, as well as the citizen, precisely know the path he is to walk in, and what he may or may not do. Let not the sword tremble over his unconscious head, or the ground be spread with quicksands and destruction, which appear fair and harmless to the eye of the traveller. Can it be pretended there is one rule of justice for a judge and another for a private citizen; and that while the latter is protected from surprise, from the malice or caprice of any man or body of men, and can be brought into legal jeopardy only by the violation of laws before made known to him, the latter is to be exposed to punishment without knowing his offence, and the criminality or innocence of his conduct is to depend not upon the laws existing at the time, but upon the opinions of a body of men to be collected four or five years after the transaction? A judge may thus be impeached and removed from office for an act strictly legal, when done, if any House of Representatives for any indefinite time after, shall for any reason they may act upon, choose to consider such act improper and impeachable. The constitution, sir, never intended to lay the judiciary

thus prostrate at the feet of the House of Representatives, the slaves of their will, the victims of their caprice. The judiciary must be protected from prejudice and varying opinion, or it is not worth a farthing. Suppose a grand jury should make a presentment against a man, stating that most truly he had violated no law nor committed any known offence; but he had violated their notions of common sense, for this was the standard of impeachment the gentleman who opened gave us, he had shocked their nerves or wounded their sensibility. Would such a presentment be received or listened to for a moment? No, sir; and on the same principle, no judge should be put in jeopardy because the common sense of one hundred and fifty men might approve what is thus condemned, and the rule of right, the objects of punishment or praise, would thus shift about from day to day. Are we to depend upon the House of Representatives for the innocence or criminality of our conduct? Can they create offences at their will and pleasure; and declare that to be a crime in 1804, which was an indiscretion or pardonable error, or perhaps an approved proceeding in 1800? If this gigantic House of Representatives, by the usual vote and the usual forms of legislation, were to direct that any act, heretofore not forbidden by law, should hereafter become penal, this declaration of their will would be a mere nullity—would have no force and effect, unless duly sanctioned by the senate and the approbation of the President. Will they then be allowed, in the exercise of their power of impeachment, to create crimes and inflict the most serious penalties on actions never before suspected to be criminal, when they could not have swelled the same act into an offence in the form of a law? If this be truly the case, if this power of impeachment may be thus extended without limit or control, then, indeed, is every valuable liberty prostrated at the foot of this omnipotent House of Representatives—and may God preserve us. The President

may approve and sign a law, or may make an appointment which to him may seem prudent and beneficial, and it may be the general, nay, the universal sentiment that it is so—and it is undeniable that no law is violated by the act. But some four or five years hence, there comes a House of Representatives, whose common sense is constructed on a new model, and who either are, or affect to be, greatly shocked at the atrocity of this act. The President is impeached—in vain he pleads the purity of his intention, the legality of his conduct, in vain he avers that he has violated no law and been guilty of no crime. He will be told, as judge Chase now is, that the common sense of the House is the standard of guilt, and their opinion of the error of the act conclusive evidence of corruption. We have read, sir, in our younger days, and read with horror, of the Roman emperor, who placed his edicts so high in the air that the keenest eye could not decypher them, and yet severely punished any breach of them. But the power, claimed by the House of Representatives, to make any thing criminal at their pleasure, at any period after its occurrence, is ten thousand times more dangerous, more tyrannical, more subversive of all liberty and safety. Shall I be called to heavy judgment now for an act which, when done, was forbidden by no law, and received no reproach, because in a course of years there is found a set of men whose common sense condemns the deed? The gentlemen have referred us to this standard, and being under the necessity to acknowledge that the respondent has violated no law of the community, they would on this vague and dangerous ground accuse, try and condemn him. The code of the Roman tyrant was fixed on the height of a column, where it might be understood with some extraordinary pains; but here, to be safe, we must be able to look into years to come, and to foresee what will be the changing opinions of men or points of decorum for years to come. The rule of our conduct, by which we are to be judged and condemned, lies buried in the bosom of



futurity, and in the minds and opinions of men unknown, perhaps unborn.

The pure and upright administration of justice, sir, is of the utmost importance to any people; the other movements of government are not of such universal concern. Who shall be President, or what treaties or general statutes shall be made, occupies the attention of a few busy politicians; but these things touch not, or but seldom, the private interests and happiness of the great mass of the community. But the settlement of private controversies, the administration of law between man and man, the distribution of justice and right to the citizen in his private business and concern, comes to every man's door, and is essential to every man's prosperity and happiness. Hence I consider the judiciary of our country most important among the branches of government, and its purity and independence of the most interesting consequence to every man. Whilst it is honorably and fully protected from the influence of favor or fear from any quarter, the situation of a people can never be very uncomfortable or unsafe. But if a judge is forever to be exposed to prosecutions and impeachments for his official conduct, on the mere suggestions of caprice, and to be condemned, by the mere voice of prejudice, under the specious name of common sense, can he hold that firm and steady hand his high functions require? No—if his nerves are of iron they must tremble in so perilous a situation. In England, the complete independence of the judiciary has been considered and has been found the best and surest safeguard of true liberty, securing a government of known and uniform laws, acting alike upon every man. It has, however, been suggested by some of our newspaper politicians, perhaps from a higher source, that, although this independent judiciary is very necessary in a monarchy, to protect the people from the oppression of a court, yet, in our republican institutions, the same reasons for it do not exist—that it is, indeed, inconsistent with the nature of our government that

any part or branch of it should be independent of the people from whom the power is derived. And as the House of Representatives come most frequently from this great source of power, they claim the best right of knowing and expressing its will; and of course the right of a controlling influence over the other branches. My doctrine is precisely the reverse of this. If I were called upon to declare whether the independence of judges was more essentially important in a monarchy or a republic, I should certainly say in the latter. All governments require, in order to give them firmness, stability and character, some permanent principle, some settled establishment. The want of this is the great deficiency in republican institutions. Nothing can be relied upon—no faith can be given either at home or abroad, to a people whose systems and operations and policy are constantly changing with popular opinion. If, however, the judiciary is stable and independent—if the rule of justice between men rests upon known and permanent principles, it gives a security and character to a country which is absolutely necessary in its intercourse with the world, and in its own internal concerns. This independence is further requisite as a security from oppression. All history demonstrates, from page to page, that tyranny and oppression have not been confined to despotisms, but have been freely exercised in republics both ancient and modern. With this difference; that in the latter the oppression has sprung from the impulse of some sudden gust of passion or prejudice, while in the former it is systematically planned and pursued as an ingredient and principle of the government. The people destroy not deliberately, and will return to reflection and justice, if passion is not kept alive and excited by artful intrigue; but while the fit is on, their devastation and cruelty is more terrible and unbounded than the most monstrous tyranny. It is for their own benefit, and to protect them from the violence of their own passions that it is essential to have some firm, unshaken, independent branch of government,

able and willing to resist their phrenzy. If we have read of the death of a Seneca under the ferocity of a Nero, we have read too of the murder of a Socrates under the delusion of a republic. An independent and firm judiciary, protected and protecting by the laws, would have snatched the one from the fury of a despot, and preserved the other from the madness of a people.

I have considered these observations, on the necessary independence of the judiciary, applicable and important to the case before this honorable court, to repel the wild idea that a judge may be impeached and removed from office, although he has violated no law of the country, but merely on the vague and changing opinions of right and wrong—propriety and impropriety of demeanor. For if this is to be the tenure on which a judge holds his office and character; if, by such a standard, his judicial conduct is to be adjudged criminal or innocent, there is an end to the independence of our judiciary. In opposition to this reasoning, I have heard, (not from the honorable managers,) a sort of jargon about the sovereignty of the people, and that nothing in a republic should be independent of them. No phrase in our language is more abused or more misunderstood. The just and legitimate sovereignty of a people is truly an awful object, full of power and commanding respect. It consists in a full acknowledgment that all power originally emanates in some way from them, and that all responsibility is finally in some way due to them. And whether this is acknowledged or not, they have, if driven to the last resort, a physical force, to make it so. But, sir, this sovereignty does not consist in a right to control or interfere with the regular and legal operations and functions of the different branches of the government at the will and pleasure of the people. Having delegated their power, having distributed it for various purposes into various channels, and directed its course by certain limits, they have no right to impede it while it flows in its intended direc-



tions. Otherwise we have no government. In like manner the officers of government are responsible, in certain modes and at certain periods, for the exercise of their duties and powers: but the people have no right to make them accountable in any other manner, or at any other period than that prescribed by the great compact of government—or constitution. Having parted with their power under certain regulations and restrictions, they are done with it; they are bound by their own act, and having retained and declared the manner in which they will correct abuses in office, they have no right to claim any other sort of responsibility. If this be not the case, what government have we? What rule of conduct? What system of association? None—but are truly in a state of savage anarchy, and ruthless confusion; with all the vices incident to civilization, without the restraints to control them.

Having discussed this necessary preliminary point, as to what is or is not impeachable, I will proceed to a consideration of the charges now in issue between the respondent and the House of Representatives of the United States. It will be some relief to this honorable court to learn, that, for the expediting of this trial, and to avoid useless and irksome repetition, the counsel for the respondent have divided the articles of impeachment among themselves. I shall beg leave to address you on the first article, which relates to the transactions at Philadelphia, on the trial of John Fries for high treason.

The gentleman, (Mr. Early,) who has offered you his observations on these articles of impeachment, appears to have grounded his argument, not on the evidence, but on the articles. Supposing, perhaps, that they would be proved, he has taken it for granted that they have been proved, and has shaped his remarks accordingly. Had we filed a general demurrer to these charges, thereby admitting them as stated, the argument of the gentleman might have had the force and application he intended. But, if I mistake not,

the respondent has pleaded not guilty, and the case must, therefore, be decided by the amount of the evidence, and not by the averments of the articles. I admit, indeed, that the honorable managers are put to some difficulty in this respect. They are under the necessity of making their election between the articles and the evidence, as the foundation of their argument; for they are so totally dissimilar that they could not take them both: they meet in so few and such immaterial points, that no man can argue, from them both, five sentences. This being the situation of the gentleman, he has thought proper to select the articles and the facts therein set forth, as the foundation of his argument, in defiance of the testimony. In the observations I shall have the honor to submit, I propose to take the evidence as my text and guide, and leave the articles to shift for themselves, under the care and patronage of our honorable opponents.

Upon reading this first article of impeachment against the respondent, after a due degree of horror and indignation at the monstrous tyranny and oppression portrayed in it, the first question, that would strike the mind of the inquirer, would naturally be, when did this horrid transaction take place; when and where was it that judge Chase thus persecuted an unfortunate wretch to the very brink of the grave, from which he was snatched by the interference of executive mercy, shocked at the injustice of his condemnation? When were the rights of juries and the privileges of counsel and their clients thus thrown down and prostrated at the feet of a cruel and inexorable judge? What would this inquirer think and believe, on being informed that these atrocious outrages upon justice, law and humanity, were perpetrated five years since? Why and where has the justice of the country slumbered so long? What now awakens it from this lethargic sleep? Why has this monstrous offender so long escaped the punishment of his crimes? To what region of refuge did he fly? But will not surprise be greatly increased, when it is told, that at the

time of the trial of John Fries, this injured and oppressed man, at the very time when these crimes of the judge were committed, the Congress of the United States, the guardian of our lives and liberties, were actually in session, in the very city where the deeds were done, and probably witnessed the whole transaction? I do not expect to be answered here, for I cannot suspect our honorable opponents of so much illiberality, that, at that period the administration of our affairs was in the hands of the political friends of the judge, and, therefore, he was permitted to escape, however atrocious his crimes. Whatever, sir, may have been the character of that administration, even if a weak and wicked one, as it has been represented, it could have no object in protecting any individual at so great a risk to themselves and their reputation. If judge Chase had really violated the law and constitution to come at the blood of Fries, and had done this in the face of the public, the administration would have put too much at hazard by endeavoring to shelter him. I hope, however, no such reason will be given for the neglect of these charges; and as we most cheerfully and truly confide in the justice of the present administration, we trust no such distrust will be avowed of the integrity of the former—we feel as safe under trial now as we should have done then, and look, without distrust, for the same impartial justice from this honorable court, as we should have expected and received at any time.

We feel, however, sir, a serious inconvenience from the delay of this prosecution. In five years, facts fall into oblivion; and witnesses, engaged in their ordinary occupations of life, cannot tax their memories with the circumstances of such distant events. It is difficult to discover, indeed, who were present at the transaction. To guard against injustice of this kind, even in civil cases, and protect us from fraudulent and slumbering demands, a limitation is put, by law, upon the claims of every man. The criminal code of the United States has justly adopted the same principle—by a statute, no person shall be prosecuted or punished for treason.



or other capital offence, with some exceptions, unless the indictment be found within three years after the offence is committed; and for smaller offences, the prosecution must be instituted within two years. We cannot, it is true, claim the benefit of the letter of this law, but we may claim something from its principle; in expecting from this honorable court every indulgence and allowance for any deficiency in our proof, which should be attributed not to the real weakness of our case, but to the unreasonable staleness of the charges. Judge Chase was a stranger in Philadelphia, and necessarily found extreme difficulty in discovering what persons were in court at the time to which the charges relate, and in selecting those who had the best recollection of the transaction.

This first article, sir, charges, "That unmindful of the solemn duties of his office, and contrary to the sacred obligations by which he stood bound to discharge them faithfully and impartially, and without regard to persons, the said Samuel Chase, on the trial of John Fries, charged with treason, before the circuit court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, 1800, whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust." This general accusation is followed by three distinct specifications of offence, to wit:

"First. In delivering an opinion, in writing, on the question of law, on the construction of which the defence of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defence.

"Second. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions, upon which they intended to rest the defence of their client.

“Third. In debarring the prisoner from his constitutional privilege of addressing the jury, (through his counsel,) on the law, as well as on the fact, which was to determine his guilt, or innocence, and, at the same time, endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.”

In the whole of these specifications I am able to discover but one truth; the rest is wholly contradicted and disproved by the evidence; it is true that judge Chase did form and reduce to writing, and, in a limited manner, deliver an opinion on a question of law, on the construction of which the defence of the accused materially depended; but when the article goes on to charge that this opinion tended to prejudice the minds of the jury against the case of John Fries the prisoner, before counsel had been heard in his defence, it is utterly unfounded and untrue. To whom was this opinion delivered? To the counsel for Fries and to the attorney for the United States; and to no other person. The third copy, and but three were made, never was delivered to the jury or to any other person, and never could produce any prejudice or injury to John Fries; nor, indeed, was it ever intended to come to the knowledge of the jury, until they had completely heard the discussion of the case by counsel, when they were to have taken out with them this opinion of the judge upon the law of the case submitted to them. At that period of the trial, when it was not only the right but the duty of the court to state to the jury their opinion of the law arising on the facts, then and not until then was it the intention of the judge to communicate to them this deliberate opinion. Could this be done with any intention to injure or oppress the prisoner; if such was the intention of the act, then and not otherwise, it was criminal. In inquiring into the nature of this act, I confine myself now to the forming and delivery of this opinion, and to decide its innocence or



criminality, we should consider it in relation to its motives, its time and manner and its consequences. If nothing partial, oppressive or corrupt is to be found in any of these, I know not in what or whence the criminality is to be established. In deciding, sir, upon the motive which prompted the judge to this act, we must look for materials in the testimony; by this we must be governed, and not by the imputations, surmises and constructions of our opponents, however eloquent and ingenious. The judge and his motives are not only strongly denounced in the article, but have also had the same fate from the mouths of the managers. I take the evidence for my guide, and I know it will be the guide of this honorable court.

What then, sir, did judge Chase declare himself to be the reasons which induced him to form this opinion, to reduce it to writing, and to hand it to the counsel? And permit me here, sir, to state, that in all criminal prosecutions for an act equivocal in itself, and whose character of guilt or innocence depends upon the intention with which it was done, the declarations of the party, made at the time, are always received in evidence to ascertain and fix the true character of the act; and the fair and legal explanation of the act is taken and derived from such declarations of the party, if not disproved by other evidence. What then did judge Chase himself say of his intention and motives in relation to this opinion? Mr. Lewis states, that on this occasion, judge Chase said, that he had understood that at the former trial there had been a great waste of time on topics which had nothing to do with the business or case, and in reading common law decisions on the doctrine of treason, as well as under the statute of Edw. 3d, before the revolution; and also relating to certain acts of Congress for crimes less than treason. That, to prevent this in future, he or they had considered the law, made up their minds and reduced it to writing. And in order that the counsel might govern themselves accordingly, had ordered three copies to



be made out, &c. &c. Here then the judge, at the time of the act now charged to proceed from a corrupt and partial intention, declares in unequivocal language what were his true motives. His object was to prevent an unnecessary waste of time in a court, where a vast deal of criminal and civil business was then depending and waiting for trial. This was the motive, and the only motive declared and avowed by the judge, at the time he delivered this offensive paper, and unless it be disproved by the evidence or the circumstances of the case, it must be taken to be the true one. It is not a subject of inquiry now, whether the reason he assigned for this proceeding be a good or a bad one; it is enough for our purpose that it most certainly is neither partial nor corrupt. As the motive was not partial, so neither was or could be the act oppressive to the prisoner, unless the judge, in executing his design of preventing the waste of time, pursued it to an unreasonable extent. If he obstructed only the introduction of irrelevant matter, and did not exclude any thing that could and ought to have benefited the prisoner, he was guilty of no injustice or impropriety. If the proper and legal rights of the counsel of the prisoner were curtailed to his injury, there was certainly injustice done; but if nothing more than wholesome and reasonable restrictions were imposed, to the manifest advantage of the general business of the court and of other suitors there, without any unjust detriment to John Fries, then not only the motive was correct, but the act was highly laudable. And such was undoubtedly the case. If we go no further than Mr. Lewis's testimony on this subject, every idea of an intention on the part of the judge to injure or oppress John Fries is done away. As far as the judge declared himself, his intention was pure and correct, and we cannot say that, in the execution of this correct intention, he would have carried it to such excess as to produce oppression and injustice. The design was crushed in embryo; as far as we are acquainted with it, it is fair and clear of oppression, and we are not

authorized to presume that, if it had proceeded further, it would have changed its character and become partial and corrupt. It is well known in Pennsylvania, that the loudest clamors are made against our courts for the delays of justice and the unreasonable time spent in the trial of every cause. These complaints had doubtless reached the ears of the judge; there was an enormous list of civil causes then before him, and he presumed that any expedient fairly to save time, would have been acceptable to every body, to counsel as well as to suitors. I have as yet considered this part of the case, only in its most unfavorable aspect to the respondent. Upon turning to the testimony of the other witnesses, its complexion becomes much more mild and unexceptionable. The suggestion, that this opinion, made up by the court, and handed to the counsel, was declared to be final and conclusive upon them, and that no argument in opposition to it was to be permitted or heard, rests wholly and solely on the recollection of Mr. Lewis. Mr. Dallas was not in court at the time it is supposed to have happened; no other witness, of all that were present has any remembrance of any such declaration, and two witnesses expressly disprove it. Mr. Edward Tilghman states, that judge Chase declared, that the court had maturely considered the law arising upon the overt acts charged in the indictment against John Fries; that they had reduced their opinions to writing; that he understood a great deal of time had been consumed upon the former trial, and that in order to save time, a copy of the opinion of the court would be given to the attorney of the district, another to the counsel of the prisoner, and that the jury should have a third to take out with them. Mr. Tilghman further states, that previously to the throwing of the papers on the table, and at the moment it was done, the judge expressed himself in these words, "nevertheless or notwithstanding counsel will be heard." Mr. Rawle, a witness examined, as well as Mr. Tilghman, on the part of the managers, gives the same account of the



declared motive of the judge in preparing this opinion, to save time, as much had been lost at the former trial; and states that the judge said the court had determined to express their opinion in writing on law, that they might not be misunderstood. Here we find the reason not only for forming the opinion, but for reducing it to writing also. The court, continues Mr. Rawle, observed, they had, therefore, committed their opinion to writing, that the clerk had made three copies, one of which should be given to the district attorney, one to the counsel for the prisoner, and one the jury should take out with them. To put this part of the transaction beyond doubt, and strengthen, if possible, the character it now bears, I beg this honorable court to advert for a moment to Mr. Meredith's testimony. He too states that the judge declared the court, on great deliberation, had formed an opinion on the law on the overt acts set forth in the indictment; and that, to save time and prevent mistakes, this opinion was reduced to writing, the copies to be distributed as mentioned by the other witnesses. He further expressly avers that the judge, when he threw down the papers, declared that the giving of this opinion was not intended to preclude the counsel from being heard, or from expressing any objections to its correctness. After this mass of concurring testimony, can the motive of the judge, in forming and delivering this opinion, be misrepresented or misunderstood; and can it now be believed or pretended that it was done, as the article charges, to prejudice the mind of the jury against John Fries before counsel had been heard in his defence? In order to bear up this charge against this weight of evidence, and in support of Mr. Lewis's testimony in discredit of that delivered by the other witnesses, the managers, who have spoken to this part of the case, pretend that Mr. Lewis should be most relied upon, because most interested in the transaction. This interest, sir, may have given a false coloring and appearance to the conduct of the judge, and his anxious zeal for his client may have represented the conduct of the



court to his mind in harsher views than it deserved. I have always understood that those witnesses were most to be relied upon who were most cool and least interested in the transaction to which they testify. But the ingenious gentlemen invert this rule. But, sir, I have no intention of making a comparison between the credibility of these witnesses, they are all respectable above suspicion. It is a question of memory and not of character between them, and we must judge from various combinations of circumstances in ascertaining the respective correctness of memory. Mr. Lewis himself most candidly declared his memory to be very uncertain and imperfect of distant events. Besides Mr. Tilghman and Mr. Meridith positively aver that the judge said, counsel would be heard on the correctness of that opinion. Now Mr. Lewis does not and cannot say that the judge did not say so, but his evidence is no more than this, either that he did not hear it at the time, or that he does not remember it now. I refer the honorable managers to their own rule about affirmative and negative testimony. In the Baltimore case, a single, solitary, unsupported witness, (Mr. Montgomery,) swears to a declaration of the judge, which some fourteen or fifteen respectable witnesses both for and against this prosecution, with equal and better opportunities of hearing all the judge said at that time, declare was not, to the best of their knowledge, uttered by the judge, nor any thing like it. Now say the managers, this single affirmative, Mr. Montgomery, is more to be depended upon than all the other witnesses put together; and if any body can think so, let it be so. But in Fries' case, we produce two affirmative witnesses against one negative witness, who testifies himself to the imperfection of his memory.

I presume sir, I have most firmly established the point, that the judge, in making up this opinion, had really and truly no other object or motive than to prevent a burdensome and useless waste of time. And sure I am, that whoever attended the first trial of Fries, would see the necessity of some regulation for this pur-

pose. How then did the judge carry this intention into execution? The opinion of the court, on the points likely to arise in the case, was put into writing and delivered to the counsel. Was this any disadvantage to them? Was it not rather a friendly guide to them, by which they might shape their argument so as best to meet the points of difficulty, and serve their client? The court furnish each side, as well the United States as the prisoner, with copies of this opinion. This would have the effect to regulate and confine the argument on both sides to the proper channel, to the real points of difficulty, and prevent a wild, devious and useless extension of the argument into matters wholly irrelevant. It was surely an advantage to Fries' counsel thus to know the opinion of the court on the points of law in their case, and thus to have an opportunity of meeting and repelling it. If they could convince the court or jury this opinion was erroneous, they would succeed for their client. But if the court had permitted the counsel to take the usual course, and had kept their own opinion in close reserve, without any intimation of its direction, until the argument was closed, and had then delivered it to the jury, as unquestionably they might have done, and this opinion had contained some points which had been overlooked by the counsel, surely it would have been more prejudicial to the prisoner than the course that was pursued. The jury would naturally take the law from the court; and if, therefore, the judge had intended to have oppressed John Fries, he would have succeeded better by reserving his opinion, concealing it from the counsel, permitting them to flounder on in the dark, and then, in his charge to the jury, dictate the law to suit his partial and oppressive purpose. Would any gentleman of the law, about to argue a case before a court, think himself aggrieved, if the judge were previously to inform him of the ideas he entertained of the case, with full liberty to controvert them? It would be esteemed a favor.



You will be pleased to bear in mind, sir, that this paper, containing the opinion of the court, was not read, nor was there any declaration whatever of its contents or substance. It was known to none, it was intended to be made known to none but the counsel for whose use it was designed. How, then, could it produce any prejudice to John Fries? No attempt was made, no intention was manifested to read it. It was privately handed to Mr. Lewis. How, then, did it become public; in what manner were copies distributed to various hands? Not, sir, by the court, but by the counsel of John Fries. Mr. Lewis, in a moment of real or affected indignation, threw the paper from him, declared his hand should not be polluted by it, and cast it upon the table of the court; and it does not appear, that to this hour he knows the contents of the paper he so hastily condemned. Several gentlemen of the bar, by this means, got hold of it, and some copies were taken. But for this conduct on the part of Mr. Lewis, nobody ever could have known the contents of the paper, or the opinion of the court. It was this that gave publicity to the opinion, and extended a knowledge of its contents, not only without the design and concurrence of the court, but decidedly against them. The act of the court was thus thrown into a different course and direction from what was intended or contemplated by them.

What, then, sir, is the whole amount of the crime of the judge, on this occasion? That he, a law judge, had been bold enough to form an opinion—not on John Fries' case, or the facts or circumstances of it, for he knew them not; but on certain abstract points of law, without first consulting and hearing Messrs. Lewis and Dallas. And further, he had not only formed such opinions, but he had the audacity to put them into the hands of these gentlemen, which, in the article of impeachment, is called "delivering the opinion." The judge, then, on mature deliberation, from a full consideration both of English and American precedents and decisions, had really made up his mind



upon what overt acts would constitute the treason of levying war; and to prevent mistake, he had reduced this opinion to writing, and for the information of the counsel on both sides, (no partial selection,) he gave a copy of this opinion to each of them; and intended to give another to the jury, to take out with them. The jury should have this opinion where they could not mistake it, instead of their memories, where it might be misunderstood. Is not this, sir, a fair and just epitome of the facts given in evidence? Is it not the full measure and amount of the judge's crime and corruption? If the judge had a right to have any opinion of his own, on the case, and if the opinion he formed was a correct one, and it is admitted, or at least not denied to be so, where or whence could any injury arise from it to John Fries or his counsel? The opinion is supported by English authority, and by the highly respectable names of judges Patterson and Iredell. And this opinion judge Chase had an undoubted right to give to the jury. He never intended to give it until the argument was closed, and then he designed to vary from the usual mode of charging juries, only in this, that, to prevent mistake and for more certainty, he would deliver in writing, instead of verbally. Yet the article charges, that, in consequence of the forming and delivering this opinion, in this illegal manner, John Fries was convicted and sentenced to death. The undisputed correctness of this opinion wipes away every idea of an intention to injure or oppress John Fries. No injustice could result to him from a legal and correct opinion, which must finally have ruled the case, delivered at any time, and in any manner. There might be some inattention to usual forms, but there could be no substantial injury. An opinion, thus anticipated, if manifestly unsound and erroneous, and against the prisoner, might carry some suspicion of unjust prejudice, but how corrupt intentions are to be proved, manifested or executed by correct opinions, is to me inexplicable. The judge had taken much labor and particular pains to inform himself on the law of the

case. He would not trust himself on hasty opinions, made up at the moment when the life of a fellow-citizen was at stake, and might be the forfeit of an error; and he therefore carefully examined the law, and deliberately took an opinion. For this unusual attention he deserves thanks, and not impeachment. If knowledge of the law be a crime in a judge, ignorance is his best recommendation; and that judge is most worthy and best qualified for his office, who possesses no opinions of his own, on any legal subject, but presents himself as a scholar to be taught by the counsel, and has no impressions but such as they are pleased to give him. I mean not to pass a sentence of condemnation on the views or conduct of the counsel of Fries. Their sole object and anxiety were to save the life of their client; and if they believed they could better effect this end by taking fire at the conduct of the court, by exciting a strong feeling and prejudice against the mode of proceeding, and by involving the court in embarrassment and difficulty, it was for them to judge how far they might pursue this object by such means, and to their own judgment I submit it. It is not easy to say how far counsel may fairly go in such a case; and when the life of the client is in issue, much more will be allowed than in common cases.

We have heard much about the agitation of the bar on this occasion. The particular cause of it has not been clearly explained. It might have been produced by the demeanor of Mr. Lewis, which, from his own account, was violent and indignant; or it might have been the mere bustle produced by the different efforts that were made to get hold of the noxious paper which Mr. Lewis cast from him, with so much feeling, as too foul for his hand; or from a combination of these with other causes. Another circumstance, equally immaterial, has been dignified with much importance by the attention the managers have bestowed upon it. I mean the novelty of the proceeding. Every witness was asked in solemn form. "Did you ever see the like before?" "How long

have you been a practising lawyer?" "How many criminals have you defended?" "Was not this mode of forming and giving opinions by the court a novelty to you?" Granted—it was a novelty—I say granted, for argument's sake—it was a novelty; and what follows? Is it therefore impeachable? Every innovation, however just and beneficial, is subject to the same consequence. But, sir, if this novelty proceeded not from impure intentions, and was not followed by oppressive or injurious consequences, where is its injustice or criminality? There were many other novelties in that trial. It was a novelty that a man, named John Fries, should commit treason, and be tried and convicted for it. I never heard of precisely the same thing before. It was a novelty that counsel should desert their cause in the abrupt manner in which it was then done. But I presume it will not be pretended that these things were wrong merely because they were novel; much less that a judge is to be convicted of high crimes and to be removed from office for a harmless novelty. The articles charge not the judge with innovations and novelties in legal forms, but with depriving John Fries and his counsel of their constitutional rights; and if he has not done this, the rest is of no importance now. But what is this strange novelty that excites so much interest and alarm? Is it that a law judge had a law opinion, and was capable of making it up for himself without the assistance of learned counsel? I hope not. I should be sorry to suppose this is a novelty in the United States. Was it then the reducing this opinion to writing, putting it on paper with pen and ink, that makes the dangerous novelty? To have the opinion is nothing; but to write it constitutes the crime. And yet, sir, where is the difference to the prisoner; except that, in the latter case, there is more certainty, less chance of misapprehension and mistake on the part of the jury, than when it is delivered to them verbally. It should be recollected, sir, and I am sure it is too important to be forgotten by this honorable



court, this written opinion contained all the limitations and discriminations on the law of treason, which could serve the prisoner, as well as those which might operate against him. But, sir, I deny that there was so much novelty either in forming this opinion or in reducing it to writing, as is pretended. Is it uncommon for judges to state their opinions on particular points of law to counsel, even before argument, for the direction of their observations? And was it ever before considered a prejudication of the case or an encroachment upon the rights of the bar? In criminal courts the practice is constant and universal. Previous to the trial of the cases of treason after the restoration of Charles II. the judges of England met together, and did form and reduce to writing opinions, not only upon the mode of proceeding upon the trials, but also on all those questions or points of law, which they supposed would arise and require their decision in the course of the trials. See Kelynge's reports, pa. 1, 2, &c.—11. Here the judges met in consultation expressly for the purposes now deemed so criminal in judge Chase, and took to their aid the king's counsel. Our judge did not take to his assistance the attorney of the United States in forming his opinion; nor did the judges in England deliver to the counsel of the accused, the result of their deliberations, but doubtless it would have been received as a favor if they had. In the only two points of difference, therefore, between the two cases, we have most decidedly the advantage.

But, sir, how can the proceeding of judge Chase, in principle and effect, be distinguished from the common and universal practice of charging grand juries, on the legal nature and description of the crimes to come under their notice? When a judge is about to hold a criminal court, he is particular to introduce into his charge those very offences, and his opinions upon them, which, by information or otherwise, he supposes will be brought before the court. The opinion of the judge in such cases is formed, is reduced to writing, and is publicly delivered in the pre-

sence of all the jurors, both grand and petit, but never was before conceived to be objectionable. Nor was it ever before supposed to be a prejudication of any man's case, who might afterwards be tried for an offence thus defined. Judge Chase stated what acts, in his opinion, would, in construction of law, amount to treason, in levying war; but whether those acts, and the necessary intention which must accompany them, would be proved upon John Fries, or any body else, was left quite at large, to be decided by the jury on the evidence. In Hardy's trial, pa. 13, chief-justice Eyre states to the grand jury, "Jurors and judges ought to feel an extraordinary anxiety, that prosecutions of this nature should proceed upon solid grounds. I can easily conceive, therefore, that it must be a great relief to jurors, placed in the responsible situation in which you now stand, bound to do justice to their country and to the parties accused. and anxious to discharge this trust faithfully; sure I am, that it is consolation and comfort to us, who have upon us the responsibility of declaring what the law is, in cases in which the public and the individual are so deeply interested; to have such men as the great sir Matthew Hale, and an eminent judge of our own times, who, with the experience of a century, concurs with him in opinion, sir Michael Foster, for our guides.

"To proceed by steps—from these writers upon the law of treason, (who speak, as I have before observed, upon the authority of adjudged cases,) we learn, that not only acts of immediate and direct attempts against the king's life, are overt acts of compassing his death, but that all the remoter steps, taken with a view to assist to bring about the actual attempt, are equally overt acts of this species of treason; even the meeting and consulting what steps should be taken, in order to bring about the end proposed, has been always deemed to be an act done in prosecution of the design, and as such, an overt act of this treason. This is our first step, in the present inquiry. I proceed to observe, that the overt acts I have been now speaking

of have reference, nearer or more remote, to a direct and immediate attempt upon the life of the king; but that the same authority informs us, that they who aim directly at the life of the king, (such, for instance, as the persons who were concerned in the assassination plot, in the reign of king William,) are not the only persons who can be said to compass or imagine the death of the king. ‘The entering into measures which, in the nature of things, or in the common experience of mankind, do obviously tend to bring the life of the king into danger, is also compassing and imagining the death of the king;’ and the measures which are taken will be at once evidence of the compassing, and overt acts of it.”

Where is the criminality of such instruction and direction? But in what does it differ in principle and in all its possible consequences to the prisoner, from the conduct of judge Chase? The learned English judge thought he was obliging the jury, not encroaching upon them, by stating fully and precisely the legal construction of those acts, which would probably be given to them in evidence, to support the charges of treason. It is true, the treason charged upon Hardy was not that of levying war—it was that of compassing the king’s death. Now, what overt acts amount to a compassing of the king’s death, is a question of law, resting upon long and established decisions and precedent. And judge Eyre thought it no crime to declare to the jury his opinion of the law in this respect. So, in our case, treason, by levying war, is a general constitutional definition of the offence; but the application of this general definition, and the fixing and describing such overt acts as amount to a levying of war, is matter of legal construction, depending upon a knowledge of former adjudications, which the judge was bound to know, or he was not worthy of his office, and which he was also bound to communicate to the jury. The difference in the cases is only here: chief-justice Eyre formed his opinion on deliberation, and he reduced it to writing; but he also publicly deliver-



ed it, with all the weight of his name and authority, in the face of all the jurors and of the country. Whereas judge Chase gave his opinion privately to the counsel, to be at their disposal and discretion; to use it for the benefit of their client, if they could; or to disregard and suppress it, if they thought proper. It might forever have been concealed from the jurors, and from the world, if the counsel of Fries had not themselves made it public. This practice of delivering opinions on points of law, in charges to grand juries, is not confined to the English courts. It is the same in the United States. The managers have pronounced a very deserved eulogium upon the official conduct and character of judge Iredell. The respondent has been referred to him, as a bright example of justice and impartiality, and it has been lamented, that, with such an example before him, judge Chase should have so wandered from the path of rectitude. We take their standard of excellence. We agree to be judged by judge Iredell; and if I show that this humane and learned judge really did the same thing for which the respondent now stands on his trial, I hope there will be an end of the complaint. On the first trial of this same John Fries, for the same offence, judge Iredell actually committed, with some circumstances of aggravation, the same enormous crime for which judge Chase is now impeached. He did form an opinion on the law of treason, he did reduce that opinion to writing, and he did deliver that opinion, the same in substance, and nearly the same in words, with that delivered by judge Chase. This bright example was before our eyes; he is now so, and let us be judged by him. In the charge, delivered to the grand jury in 1799, who found the first bill against Fries, for treason, speaking of those cases which he thought would come before the court, the judge says, "The only species of treason likely to come before you, is that of levying war against the United States. There have been various opinions, and different determinations on the import of those words. But I think I am warranted in saying, that, if

in the case of the insurgents, who may come under your consideration, the intention was to prevent, by force of arms, the execution of any act of the Congress of the United States altogether, (as, for instance, the land tax act, the object of their opposition,) any forcible opposition, calculated to carry that intention into effect, was a levying war against the United States, and, of course, an act of treason. But if the intention was merely to defeat its operation, in a particular instance, or through the agency of a particular officer, from some private or personal motive, though a higher offence may have been committed, it did not amount to the crime of treason. The particular motive must, however, be the sole ingredient in the case; for, if combined with a general view to obstruct the execution of the act, the offence must be deemed treason."

Judge Iredell, therefore, so far from conceiving it to be a crime to have an opinion upon the law of treason in levying war, and the overt acts which would constitute it, to reduce that opinion to writing and to deliver it both to counsel and jury, seems to have considered it, as chief-justice Eyre had done before him, to be his duty to do so. The opinion, delivered by this respectable judge, coincides entirely with that of judge Chase, and the manner of delivering was, on our opponents' principles, vastly more exceptionable. The novelty of this proceeding seems to have vanished on investigation. There is, indeed, one striking difference in the two opinions; that judge Chase goes more fully and clearly into the definition of the offence, and is more particularly careful to state those distinctions and discriminations which might serve the accused, and reduce his transgression to some smaller offence, provided they could appear in his case. He sets out not only the description and character of those overt acts which constitute treason, but enumerates also with equal care such as will not amount to that offence. If these favorable discriminations might in any way have been useful to the accused, they



were put fully into the power both of the counsel and the jury.

The gentleman, who opened the prosecution, (Mr. Randolph,) took occasion to speak in very handsome, and I doubt not very deserved terms of applause, of a distinguished judge in Virginia. This same judge has published an edition of Blackstone's Commentaries, into which he has introduced a variety of his own opinions on the constitution and laws of the United States. If hereafter a person should be accused under the operation of some of those statutes on the construction of which judge Tucker has published his comments and opinions, would it be any impeachment of the justice and impartiality of this judge to say, he had made up his opinion, he had reduced it to writing, he had delivered it to the world and therefore he had prejudged the case. No, this would be a sort of reasoning even more absurd than the Richmond *non sequitur*. The honorable manager, (Mr. Randolph,) to enforce and exemplify his doctrines on this subject, put an analogous case. He stated that a judge, holding a criminal court, might properly give the legal description of murder, and the circumstances and ingredients that in point of law would constitute this offence. But, says he, he may not go on to apply this definition to the overt acts laid in the indictment. This I confess, is a novelty to me. I never before heard of overt acts in an indictment for murder. The general charge of the offence is laid in legal and general terms, but there is no specification of the particular facts and circumstances by which the charge is to be supported. But suppose a judge, knowing that a man was coming before him for trial, accused of going into the street with a declared resolution to kill the first person he should meet; and this judge were to say to any person or in any place, verbally or in writing, that a killing under such circumstances was murder, and a full manifestation of malice in legal construction, would this be called a prejudication of the case? Is it not a mere declaration of the



law existing and established long before the case, which it was the duty of the judge to know, to obey and to declare? If the facts, proved before the jury, brought the accused within the law, the consequence of conviction followed, not by the will of the judge, but by the sentence of the law; and while this question was left open, the case was in no wise prejudged. To explain this point still further, I will put the case of libelling. This offence, like that of treason, consists of two parts; the act and the intent. Would it be criminal in a judge, knowing that such a case was to come before him, to inform himself, if necessary, of the law of libels, to make up his mind upon the constituent parts of the offence, and to declare them to the grand jury, the counsel or any body else? Might he not be of opinion, and write and say, that a libel is a malicious defamation of any person in writing, in order or intending to excite their wrath, or to expose them to public hatred or contempt? Here the fact of publication must be proved and the malicious intent. And might not a judge state what in contemplation of law is a malicious and defamatory writing, and that if such a one is published with intent to injure and defame, it is in law a libel? Apply this doctrine to the case of Fries. May not a judge have an opinion and declare, that an insurrection of a body with intent or in order to resist the execution of any law of the United States, and the carrying that intent into execution by actual force and violence, is treason against the United States by levying war? There is no prejudication in either case; the facts and the intent which constitute the crime, and on which the guilt or innocence of the accused depends, are left wholly untouched, and come without prejudice or bias to the jury. I have heard the phrase "prejudging the law" repeated over and over again. Judge Chase prejudged the law against Fries, we are told—I confess the phrase is a very singular one to me. I know not precisely how to understand it. I can comprehend what is meant when I hear of prejudging a man's case—in prejudging the

facts of any case. But as to the law, I presume it is always prejudged ; always settled, certain and ascertained. It is never a question in the case of murder, whether a killing, with malice prepense, is or is not murder. The law has prejudged that ; and so in all other cases the question is, whether the facts proved bring the case within the law. And so it was in Fries' case, and upon that point judge Chase neither gave nor intimated nor had an opinion ; for as the evidence had not been heard, he could not anticipate what facts would be proved.

I hope and trust, sir, that the first specification of this article is now disposed of to the satisfaction of this honorable court, and the complete justification of the respondent. Part of it, when tested by the evidence, turns out to be wholly unfounded ; and the rest, which is true, has been fully justified both on principle and by precedent. If there was some haste and error in the conduct of the judge, which however I neither believe or admit, there was certainly no criminality in the act. There was nothing impure in the motive, nothing injurious in the consequence.

Suffer me now, sir, to offer you some observations on the second specification of the first article of impeachment. I hope it will not be necessary to trespass greatly on your patience in refuting it. It charges judge Chase with " restricting the counsel for the said John Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defence of their client." This charge consists of two parts ; it complains of a restriction as to English authorities, and as to American statutes. I will consider them distinctly. First, sir, permit me to remark, that these allegations are made to support the general charge of partiality, oppression and injustice. But what becomes of these pretences, when we bear in mind the testimony of Mr. Rawle, the district attorney, and always, and in every situation, a gentleman whose



character, in all its relations, both public and private, bears the first stamp of respectability, and fears no competition for credit? He has informed this honorable court, that this restriction, so grievously complained of, and now the subject of a criminal prosecution, was imposed upon him, as well as upon the counsel of Fries. Is this the character or the conduct of partiality or oppression? Does it evince that strong appetite the judge is said to have, to drink the heart's blood of this unfortunate German, and stain the pure ermine of justice with his gore? I have always understood by partiality in a judge, a favoring bias to one party to the prejudice of the other; but where a restriction is put equally on both sides, I cannot conjecture how it can be resolved into partiality or oppression. It will be seen presently, that, as far as this restriction could have any operation, it was friendly in that operation to John Fries. But, sir, what was this restriction, so much complained of and now magnified into a high crime? That certain English decisions in the law of treason, made before the revolution of 1688, should not, or ought not to be read to the jury. And pray, sir, what were these decisions? I will take their character from Mr. Lewis himself, and no man is better acquainted with them. He says, they were decisions of dependent and corrupt judges, who carried the doctrine of constructive treason to the most dangerous and extravagant lengths. True, they were so—sanguinary, cruel and tyrannical in the extreme—and could the exclusion of such cases injure John Fries? If cases, which extenuated and softened the crime of treason, had been rejected, he might indeed have suffered; but how he was or could be injured by keeping from the jury those cases which aggravated his offence, I am really at a loss to learn. The restriction, there, was on the United States. Had they been adduced by the attorney-general, no doubt they would have been ably answered by the defendant's counsel. But the ability of the counsel was not inferior to Fries' counsel; and if judge Chase had indeed a design to



oppress and injure John Fries, and to convict him on strained constructions of treason, his best policy would surely have been to have suffered these cases to have come forward; and, if supported by his authority and the talents of the counsel of the United States, they might have had their influence with the jury, notwithstanding the able refutations they might have received. But why and for what good purpose did the counsel desire to read these cases, operating, if they operated at all, directly against the life of their client? Why would they fatigue the court and impose upon the jury with those wicked and ridiculous decisions against a man who wished his stag's horns in the king's belly; and another, who declared he would make his son heir to the crown. Sir, there could have been but one object in this attempt. It was this, to excite such horror in the minds of the jurors by reciting these tales of tyranny and blood, as would create a general prejudice in them against all the laws of treason. The abhorrence, which would be honestly given to such extraordinary cases of cruelty practised under the law of treason, they hoped would extend itself to all cases of treason, even the most just and upright. I know another and ingenious coloring and pretence has been given for this design, this strange anxiety to read cases, which so strongly support prosecutions for treason. It has been said by Mr. Lewis, not here as a witness, but in Philadelphia, as counsel for John Fries, that his object in desiring to read these extravagant cases was of this sort. That many of the decisions on the law of treason, made since the revolution of 1688, and which are received as authorities in modern courts, were actually grounded on the iniquitous cases decided before the revolution; and, therefore, says Mr. Lewis, we wished to lay these cases before the jury, that they might place no reliance on those since the revolution, which were derived from them. Could the gentleman be sincere in this pretence? How far would he carry it? To all decisions since the revolution? And are we to have no ad-

judications on this subject which may be relied upon as sound, legal and virtuous? I apprehend he does not mean so much. He desired, I presume, only to discredit such of the English decisions, since the revolution, as were derived from those corrupt sources alluded to. Then, most assuredly, he was premature in his attempt to read these precious cases. If the district attorney should read, and rely upon any case decided since the revolution to convict John Fries, and Mr. Lewis could trace that decision back to the horrible times spoken of, and show that it was derived from and grounded upon the opinions of those corrupt and dependent judges, it would surely have been competent for him to do so, and no court would have attempted to prevent him. But that he is to deluge the court and jury with a mass of trash and corruption, and so declared to be by himself, by way of anticipation, and when no necessity had occurred or probably would occur to justify it, could not be endured by any court knowing its duties and respecting its dignity. These cases are law, or they are not law. If the former, their operation and influence were against the prisoner; if the latter, the court should not suffer them to be read to mislead and impose upon the jury. So far, sir, and I shall trouble you no further, on the exclusion of these English statutes. Now, as to the statutes of the United States. That any such restriction was laid on the counsel of John Fries, rests wholly and entirely on the testimony and recollection of Mr. Lewis. I will, sir, first consider the nature and extent of this charge against the respondent, supposing the fact to be so. I presume it will be granted to me, that a judge has some sort of authority in a court; that he does not sit there as a mere cypher, without power or command. Among the acknowledged powers of a judge, is that of regulating and directing in some degree the argument before him, and preventing the introduction of matter either grossly improper, or palpably irrelevant to the issue. If then it be demonstrated that these statutes of the United States had



really and truly nothing under heaven to do with the trial of John Fries, I hope the judge will not be condemned for excluding them. John Fries, sir, was indicted for the treason of levying war against the United States, and for no other offence. This crime is created and defined by the constitution of the United States. It became the duty of the attorney of the United States to show to that court and jury, that the prisoner had been guilty of the treason charged in the indictment, according to its definition and description in the constitution, or the prosecution must fail. If, on the other hand, he did show this to the satisfaction of the court and jury, John Fries must necessarily be convicted. Now, sir, what possible influence or control could any act of Congress have over the character of a crime defined in and derived from the higher authority of the constitution. The act of Congress could not enlarge, restrict, or in any way alter or affect the constitutional description. To what proper purpose then, could any act of Congress be read? Why, sir, we have heard something about a legislative construction of the constitution; and that these acts of Congress defining sedition and other offences, might be used, and were important to show what was intended by the constitution in the description of treason. In the first place, sir, Congress, in passing these statutes, never had the most remote idea or intention of giving any sort of construction or opinion upon the law of treason; and if they had such an intention, it was beyond their powers and rights, and should be wholly disregarded, not only by that court, but by this. The construction of the constitution, in common with every other law, belongs exclusively to the judiciary, as best qualified both from its permanency and independence, as well as from legal learning, to exercise so important a right. The necessity of a power existing somewhere to judge of the constitution, and of the conformity or non-conformity of laws to the provisions of it, results from the very nature of a written constitution. It is in vain we have an instrument



paramount to ordinary legislation, if there is no authority to check encroachments upon it, and there is no department of government with whom this power can be so safely lodged, or by whom it can be so ably and impartially exercised as the judiciary. If the legislature, the very branch of government most controlled by the constitution, and intended to be so, shall be permitted to assume the wide and unlimited right of construction, the constitution will sink at once into a dead and worthless letter; moulded into various fantastic shapes at the will of the legislature, and purporting one thing to-day and another to-morrow, and nothing at last. But Congress, I repeat, sir, in passing the sedition law, had no intention whatever of giving their construction to the constitutional description of treason, or of affecting or touching it in any way. The counsel of Fries, were therefore, about to use or abuse the act of the legislature to purposes never contemplated or intended. Should the court suffer a delusion of this sort to be practised upon a jury, equally disrespectful to the court and to the Congress? It was not judge Chase only, who thought these statutes of the United States totally irrelevant to the case of Fries. They had been solemnly adjudged to be so, after every exertion of the talents of the counsel to show their application and force. I refer you, sir, to the opinion of judge Iredell, on the first trial of Fries.

“An act of Congress which I have already read to you, (that commonly called the sedition act,) has specially provided, in the manner you have heard, against combinations to defeat the execution of the laws. The combinations punishable under this act, must be distinguished from such as in themselves amount to treason, which is unalterably fixed by the constitution itself. Any combinations, therefore, which before the passing of this act, would have amounted to treason, still constitute the same crime. To give the act in question, a different construction, would do away altogether the crime of treason, as committed

by levying war, because no war can be levied without a combination for some of the purposes stated in the act, which must necessarily constitute a part though not the whole of the offence.

“ This, gentlemen of the jury, is an indictment against the prisoner at the bar, for levying war against the United States; the first inquiry therefore is, what is meant by these words of our constitution. ‘ Treason against the United States, shall consist only in levying war against them,’ &c. These words are repeated verbatim, I believe, in an act of Congress, called the judiciary act, defining the punishment of the crime of treason, pursuant to constitutional authority. This crime being defined in the constitution of our country, becomes the supreme law, and can only be altered by the means therein pointed out, and not by any act of the legislature; and, therefore, the repetition of the words of the constitution in the judiciary act is quite unnecessary, as the only power left to Congress over this crime was, to describe the punishment; the same act, in another part, makes provision for the method of trial. Agreeable to their power, Congress have described the punishment, and thereby declared the crime to be capital. It is clear, therefore, that, as the constitution has defined the crime, the Congress, drawing its sole authority from that constitution, cannot change it in any manner, particularly as it is so declared; yet the counsel for the prisoner say, that the legislature have given it a legislative interpretation, and that their interpretation is binding on this court. They say that Congress did not mean to include the offence, charged upon the prisoner at the bar, under the definition of levying war; because the sedition act describes a similar offence, and because a rescue is provided for in another act, the punishment extending no further than fine and imprisonment. Several answers may be given to remove these objections :

“ First, if Congress had intended to interpret these words of the constitution, by any subsequent act, they had no kind of authority so to do. The whole judicial



power of the government is vested in the judges of the United States, in the manner the constitution describes. To them alone it belongs to explain the law and constitution ; and Congress have no more right nor authority over the judicial expositions of those acts, than this court has to make a law to bind them. If this was not an article of the constitution, but a mere act of Congress, they could not interpret the meaning of that act while it was in force, but they may alter, amend, or introduce explanatory sections to it. In this we differ from the practice of England, from whence we received our jurisprudential system in general ; for they having no constitution to bind them, the parliament have an unlimited power to pass any act of whatever nature they please ; and they, consequently, cannot infringe upon the constitution. The very treason statute of Edward III. itself, contains a provision giving parliament an authority to enact laws thereupon, in these words : ‘ because other like cases of treason may happen in time to come, which cannot be thought or declared at present ; it is thought, that if any such do happen, the judges should not try them without first going to the king and parliament, where it ought to be judged treason, or otherwise felony.’ On this point sir Matthew Hale was very careful, lest constructive treason should be introduced.

“ This, gentlemen, you will observe, only relates to any case not specified in that act. But, on the occasion now before you, it is not attempted, by any construction or interpretation, that any thing should be denominated treason; that is not precisely and plainly within the constitution. No treason can be committed except war has actually been levied against the United States.

“ But further, nothing is more clear to me than that Congress did not intend, in any manner whatever, to innovate on the constitutional definition of treason ; because they have repeated the words, I think, verbatim, in their own act, with regard to the rescue and obstruction of process which is mentioned in the act



alluded to ; it will not be pretended, by any man, that every rescue, or every obstruction of an officer in serving process, or even both together, amounts to high treason, or else to no crime at all. No ; the crimes are differently specified, and rescue or obstruction of process may be committed without that high charge. This, I think, was sufficiently explained by the counsel for the United States."

Will it be pretended, sir, that counsel have a right to read any thing before the court which they may find in a law book ? Is there any thing of such peculiar dignity and privilege in the statutes of the United States, that any of them may, at all times and on all occasions, whether pertinent or not, be read in a court of justice ; and is it a high crime in a judge to prevent it ? Suppose the counsel had chosen on the trial of John Fries to amuse themselves with reading the revenue laws of the United States ; would the mere circumstance of their being bound in our statute book have given them such a sacred character that the court would be bound to listen with the most respectful attention to such an absurd waste of time ? I do not hesitate to aver that the revenue laws have full as clear and proper an application to the case of John Fries as either of the statutes the counsel were so anxious to produce.

But, sir, although judge Chase undoubtedly believed that these statutes of the United States had no sort of application to the case before him, and we contend, that he would have been wholly justifiable in excluding them from the discussion, yet we deny, most explicitly, that he did so. The respondent never declared that these laws should not be read or referred to on that occasion. The proof of the fact rests entirely on the recollection of Mr. Lewis. Among the numerous spectators of this transaction, not a man but Mr. Lewis has been produced to sustain this charge, now deemed so important. Mr. Lewis has, doubtless, declared the fact as he believes it ; but, sir, when we recollect the agitation of this gentleman, as described by

himself, the strong state of feeling or passion into which he was excited, the length of time and the acknowledged frailty of his memory; and when to this we add, that something was probably said about the irrelevancy of these statutes, we shall find sufficient reason to believe that Mr. Lewis has, in this respect, fallen into a mistake. Opposed to this imperfect recollection, we have Messrs. Rawle, Tilghman, Meredith, Biddle and Ewing, all possessing an equal opportunity with Mr. Lewis to hear and to understand what passed from the court; and from their cool and disinterested situations, less likely to receive unfounded or discolored impressions. I cannot avoid reminding you, sir, that Mr. Tilghman and Mr. Rawle are witnesses summoned and examined on the part of the United States, and although the honorable managers have thought proper to claim only Mr. Lewis and Mr. Dallas, and to treat the other gentlemen as witnesses for the respondent, they are, nevertheless, entitled to the full regard and respect, whatever it may be, attached to the witnesses for the majesty of the people. The five gentlemen I have named, were all of them in court during the trial of John Fries, and at the time Mr. Lewis supposes this restriction to have been laid upon him. And yet not one has any recollection of any such prohibition. I believe they or some of them state, in decided terms, that none such was made. If this comparison of the recollection of five witnesses against one, who himself testifies to the imperfection of his memory, leaves any doubt about the truth of the fact, I can refer this honorable court to a written document, drawn up by Mr. Lewis, in conjunction with Mr. Dallas, which must put the question to rest. When there is such a contradiction in the testimony of such respectable witnesses, it is a great relief to my mind to have some permanent voucher to refer to, to decide the difference. I allude, sir, to the letter addressed by Messrs. Lewis and Dallas to Mr. Lee, then attorney-general of the United States. This letter was written in May, 1800, soon after the trial of Fries, and when



every circumstance was fresh in the memory of Mr. Lewis. This letter was written in consequence of a communication from Mr. Lee, stating "that the case of Fries was before the President; that all the information was wished, which could assist in making a proper decision upon a claim for mercy and pardon; for which purpose Mr. Lee desired to know the grounds on which the counsel intended to have enforced the defence." In consequence of this solemn and important call, from such high authority, and for such an interesting purpose, Mr. Lewis writes to Mr. Dallas—states, that, in justice to "poor Fries," as well as to themselves, they ought to make the desired communication; that they should state their intended arguments, &c. &c. and that they should state, "in decent and manly terms, our reasons for declining any interference in the trial." He then requested from Mr. Dallas "every communication likely to render service to poor Fries." Turn, then, sir, to the letter addressed to Mr. Lee, with all these friendly dispositions, on the part of Mr. Lewis, with all the anxious desire he had to serve poor Fries, and with all the aid of Mr. Dallas, in making the statement, which was to contain all their information on the subject, and all their reasons for declining to interfere in the trial. We find, sir, in this important letter, that they informed the President that the "cause was prejudged" by an opinion they were wholly unacquainted with; by a paper they had never read, and knew not the contents of; and the jury were also prejudged by this opinion, although they knew not what it was. But, sir, we do not find any complaint whatever; nay, not the slightest suggestion that the court prevented or forbade the reading of these statutes of the United States, or restricted the counsel from making any use of them they thought proper. With the manifest disposition of these gentlemen, in writing this letter, with the object before them, for which it was required, and the uses they intended should be made of it, uses which they anticipated at the moment they abandoned the cause, is it



probable so important a circumstance would have been omitted, if it had really occurred. I refer you and this honorable court, sir, to the following pages of the evidence, printed at the last session of Congress, for the use of the House of Representatives—pages 21, 24, 25, 26, to 32.

May I not now flatter myself, sir, that all the criminality, charged upon the respondent, in the second specification of the first article of impeachment, is washed away from the minds of this honorable court. Under this hope and impression, I will proceed to consider, as briefly as possible, the third and last specification. In this the judge is charged with “debaring the prisoner from his constitutional privilege of addressing the jury, (through his counsel,) on the law as well as on the fact, which was to determine his guilt or innocence, and, at the same time, endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.” This charge is absolutely unfounded and untrue, and is, in all its parts, most completely disproved by the evidence. As to debarring counsel from being heard, I need only refer you, sir, to the testimony of Messrs. Tilghman and Meredith, who expressly swear, that judge Chase, when he threw down the paper, containing the opinion the court had formed on the law, explicitly declared, that, nevertheless, counsel would be heard against that opinion. It is, indeed, true, that Mr. Lewis seems, throughout the business, to have been under an impression, that nothing would be heard in contradiction to that opinion; and that his professional rights were invaded. But this appears to be a hasty and incorrect inference or conclusion of his own, from the conduct of the court. He wholly misapprehended the court, and has charged his misapprehension to their account. This is the usual effect of such precipitate proceedings. The managers have greatly relied on this circumstance; they urge, that Mr. Lewis, through the whole of the affair, and

in all he said concerning it, took for granted and stated that he was debarred from his constitutional privileges. He did so; but he did so under a mistake of his own, not proceeding from the court. It is not only that no other witnesses speak of any such restriction, but expressly negative it and say, some of them at least, that none such was imposed; but Mr. Rawle has further informed you, that it appeared to him throughout the business, that Mr. Lewis had wholly misunderstood the court, and mistook their intention. But surely, sir, we are not to be condemned because we have been misunderstood; especially as the mistake seems to have been peculiar to Mr. Lewis, and no other witness fell into the same error. I rely most implicitly on Mr. Rawle's testimony, not only from the strength and correctness of his character, but from the unusual pains he took to be accurate in his knowledge of this transaction. His notes are copious, connected and satisfactory, and although he has no notes of the first day's proceeding, yet he seems to have given an uncommon and cautious attention to every circumstance to which he has testified. This gentleman negatives every idea of any restriction upon the arguments of counsel, and is supported by every witness but Mr. Lewis. If any doubt can remain upon this subject, I am happy to have it in my power to refer to a written and unchanging document, which destroys the third specification, and demonstrates not only that the counsel were not prohibited from addressing the jury both on the law and the fact, but also that the right of the jury to decide both the law and the fact, was most largely and explicitly avowed and declared to them. I beg to refer this honorable court to the second exhibit, filed with the respondent's answer. It contains this very opinion so scorned by the counsel of Fries, and from the pollution of which they shrunk with horror. If they had read it before it was thus indignantly condemned; if it had been understood before it was consigned to contempt and denounced as a violation of every valuable and sa-



cred right, how much confusion, how much unnecessary discontent might have been saved and prevented. In this opinion, then, will be found the sentiment, in these words: "it is the duty of the court, in this and in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide, on the present and on all criminal cases, both the law and the facts, on their consideration of the whole case." Was there ever a more ample and explicit avowal of the rights of juries? Is there any friend to juries so extravagant as to contend or ask for more? The acknowledgment is as full as any man can require, or the law would warrant. The judge, in thus admitting and confirming the right of the jury to decide both the law and fact, admits by inevitable consequence that the jury have a right to hear counsel both upon the law and facts. That which they are to decide upon, they must have information upon; and the court, which declares the jury to be the tribunal to determine the whole case, never could have said in the same breath, that they should hear no argument on the case they were thus to determine. This monstrous absurdity, of which the judge can hardly be suspected, brings it to a certain conclusion, that Mr. Lewis must have mistaken the court; and that no such restriction was laid upon him or the jury as he has apprehended.

The charges, sir, laid in this first article of impeachment, are grounded altogether on the proceedings of what has been called the first day of Fries' trial; and most firmly believing that the whole of this proceeding on that day will bear the most scrutinizing inquiry, and stand on the strong ground of justification, I have been willing to meet the managers on that day's proceeding disjointed from that of the following day. But, sir, it is most evident, that this is by no means a full or a fair examination of the judge's conduct on that occasion; when he is charged with a corrupt or partial intention to injure and oppress John Fries, when he is charged with a wilful violation of the rights of the



counsel and jury, the whole of the proceeding should be brought into view, before we decide upon the character of any part of it. An attention, sir, to what passed on the second day, as it is called, of Fries' trial, will most abundantly prove that judge Chase never had intended any partiality or oppression against him; and certainly that, if he had any such intention, he never carried it into execution or effect. And I trust I am safe in saying that the mere intention to commit a crime, however gross or outrageous, unless carried into some sort of action or effect, constitutes no crime. A man may intend to commit a larceny, assault and battery, or any other offence; but while he abstains from the act, the mere intention cannot subject him to trial or punishment. The respondent, then, discovering from the conduct of Fries' counsel, and the indignant hostility they assumed, that he was greatly misunderstood; that an arrangement he had adopted for the convenience of public justice, the reasonable expedition of the approaching trial, and the real accommodation of the court, the counsel and the jury, was construed and received as an oppression upon the prisoner, an encroachment upon the privileges of counsel, and a violation of the rights of the jury; in short, as a corrupt and polluted prejudication of the cause to be tried, and that the fair and upright intentions of the court were misinterpreted, by a real or pretended mistake, into the vilest purposes of partiality, resolved to destroy the formidable engine they saw erecting against the court, and to remove at once all pretence for clamor or irritation. Granting the judge had been in error on the first day, what more could he or any man do, than to rectify the error as soon as it was discovered, and hasten to the right path before any injury could have resulted from his momentary deviation. But the honorable manager has told you he had sinned beyond the grace of repentance, and that no contrition, however sincere, could wipe away the offence. When I suffer such words as repentance and contrition to pass my lips, it is in quot-

ing precisely the words of the manager. For my part I disclaim them. The respondent has done nothing that required the humiliation of repentance, or for which he now asks to be forgiven. Let him stand on his justification or stand not at all. But, sir, a part of that justification is that the corrupt intent, charged upon him, is disproved by his entire willingness to permit the counsel to manage their cause in their own way, if they disapproved of his, and by his full and candid retraction of the error, if any error had been committed. By adverting to the testimony of Mr. Rawle, this honorable court will see, how greatly judge Chase was surprised to find, from conversing with this witness and judge Peters, that his conduct was viewed in so strange a light by Messrs. Lewis and Dallas. On making this discovery, although still convinced of the propriety of the proceeding, he does not obstinately adhere to it, but resolves to remove all possible cause of complaint, by withdrawing all the papers which had given rise to this astonishing irritation and violation. The papers were accordingly resumed, every copy collected, and the counsel, the prisoner and the jury, were placed in the same precise situation as if these papers had never been distributed; with the most ample acknowledgment of all their rights, and the most urgent solicitations to them to proceed in the enjoyment and exercise of them. But no, the counsel had taken their ground, and nothing could move them. John Fries had received their instructions, and with equal perseverance declined the aid of other counsel offered to him by the court repeatedly. Now, sir, let me ask you and this honorable court, on your consciences, not to be blinded by the management and finesse of ingenious counsel—what was the meaning of all this? What was the object of it? Did the counsel now believe they would not be fully heard in defence of their client both on law and fact? Did they now suppose themselves or the jury restricted in their rights, or that a just and impartial trial would not be had? Most certainly not. But, in the language of Mr. Lewis,



they thought they had got the court into an error or a scrape, and they were determined to keep them there. What! says judge Peters, if we have done wrong, will you not suffer us to repair that wrong by doing what is right, by doing all that you have required? No, no, was the answer. Mr. Lewis has declared to you, in the most ample and explicit terms, that they abandoned John Fries because they thought they took a better chance of saving him by this means, than they could have by any trial; and to use his own words in another part of this testimony, 'we withdrew,' says he, 'from the defence of John Fries, because we thought it would best serve him, and we were not influenced by any other motive whatever.' They had already, before judge Iredell, tried the efficacy of the full and unconfined exertion of their talents in his defence, and found how vain the attempt was. They were well satisfied no hope of success could be entertained on a fair trial of the merits of their case, both in law and fact; and they eagerly grasped any occurrence, that, by operating on the passions, the humanity or the prejudices of mankind, might give to their client a chance for escape, which he could not look for in the merit of his own conduct. With this view, they most solemnly impressed upon the mind of John Fries the necessity of his maintaining the ground they had taken for him, and refusing the assistance of any other counsel. So well did these gentlemen know the court had no intention of oppressing John Fries, that in their communications to him, they anticipated the offer of other counsel to supply their desertion.

But, sir, there is one circumstance in this second day's proceeding, which has been introduced to show, that the respondent continued the same tyrannical spirit with which he is charged on the first day, and which it may be incumbent on him to remove. I mean the "unkind menace," as it has been termed by one of the witnesses, used to the counsel of Fries, when the judge told them they would proceed in the defence



at the hazard or on the responsibility of their characters. To ascertain the true nature of the expression, whatever it was, which fell from the court in this respect, I will refer to the same guide I have endeavored to follow throughout my argument, I mean the evidence. The aspect of this pretended menace will then be changed into a complimentary confidence in the discretion of the counsel, or at least into no more than such a menace as every gentleman of the bar acts under in every case; that is, to manage every cause before a jury, with a due regard to their own reputations; to urge nothing as law to the jury, which they are conscious is not law, and to introduce no matter which they know to be either improper or irrelevant. This, in its worst character, will be found to be the whole amount of this terrific menace. What account does Mr. Lewis give of this occurrence? After stating that the court manifested a strong desire that he and his colleague should proceed in the defence of their client; that every restriction, if any had been imposed, was now removed, and that they were at full liberty to address the jury on the law and the fact as they thought proper; the judge said that this would be done "under the direction of the court, and at the peril of our own character, if—we conducted ourselves with impropriety." And was it not so? And where is the criminality of saying so? Mr. Lewis did not consider this as a menace, intended to restrict him in the exercise of the rights just before conceded him by the court, but rather as an unwarranted suspicion of his sense of propriety; for, says he, "I did not know of any conduct of mine to make this caution necessary."

The court, perhaps, thought his conduct on the day before, did make it necessary. Let us now take Mr. Dallas' impression of this part of the conduct of the judge. This witness, after testifying to the ample range, both as to law and fact, given to the counsel by the court, states that the judge observed, "they

would do this at the hazard of their characters." This Mr. Dallas afterwards terms an "unkind menace." I think, upon recurring to Mr. Lewis and the other witnesses, and to some considerations naturally arising from the manifest disposition of the court at that time, it will be concluded that Mr. Dallas has mistaken the nature and character of this act of the judge, when he describes it as a menace. Mr. Tilghman states, that the court seemed very anxious that the counsel should proceed, gave them full liberty to combat judge Chase's opinion before the jury, and that they were not to be bound by that opinion. Judge Chase mentioned that cases at common law before the stat. of Edw. III. ought not to be read. So of certain other cases; he particularly mentioned the case of the man who wished the stag's horns in the king's belly; and also of the man who kept a tavern with a sign of the crown, who said he would make his son heir to the crown. The judge declared such cases must not be cited, and said in illustration of his idea; what! cases from Rome, from Turkey and from France! that the counsel should go into the law, but must not cite cases that were not law. After these observations, and in direct connexion and reference to them, the judge said something about "their proceeding agreeably to their own consciences." What now begins to be the complexion and character of this part of the judge's behaviour? Why, that after giving these gentlemen the utmost latitude of discussion they could possibly require, he states a certain class of decisions and cases, which appeared to him, and must appear to every body to be unworthy of notice, to be of no sort of authority or application in the case of Fries; which were not law; which Mr. Lewis himself, has described as the offspring of corrupt and dependent and bloody judges, and which, if they had any operation, were hostile to the prisoner: I say, sir, after alluding to such cases, which he knew too had been used on the former trial, was it criminal

or strange, he should make an appeal to their consciences, or characters, take it either way, before they proceeded to their defence?

A further examination of testimony, puts this part of the case beyond doubt. Mr. Rawle, after stating the same course of observations from the judge, as has been mentioned by Mr. Tilghman, and that he said, "I have always conducted myself with candor, and I meant to save you trouble." After relating to you how fully the respondent removed every obstacle which had arisen from the proceeding of the first day, and how honorably he explained and justified the motives of his conduct, declared himself thus to the counsel: "having thus explained the meaning of the court, you will stand acquitted or condemned to your own consciences,"—the same terms used by Mr. Tilghman,—“as you think proper to act. Do as you please.” This honorable court will be pleased to recollect that Mr. Rawle speaks not from the imperfect impressions of memory, after the lapse of five years; but from full notes taken at the very moment of the transaction. Is it needful to go further in justification of this mistaken menace? What says Mr. Ewing? "That the respondent told the counsel that if they read cases which were not law, after knowing the opinion of the court, that they were not so, they would do it with a view to their own reputations." Mr. Meredith, after reciting what the judge observed upon the cases at common law, testifies that the respondent informed the counsel of Fries, "they might manage the defence in such way as they thought proper, having regard to their own characters." I hope, sir, we have now obtained a just notion of the nature and intent of whatever was said by the judge at this period of the transaction; and as no witness considered it as a menace, but Mr. Dallas, we may justly conclude he has mistaken it. Is not this the true interpretation of it, that the judge had determined to give these gentlemen the utmost latitude of discussion, both of the law and fact, to any extent they thought proper, re-



ferring them only to their own sense of propriety, to their own consciences, to their regard for their own characters, as to the manner in which they would use this unbounded liberty? The respondent confided in the character and conscience of these gentlemen for the fair exercise of their professional duty, and for such a limitation of their privilege of speech, as would prevent any abuse of it to improper purposes, or to an unreasonable extent. Suffer me, sir, to make one further remark, in confirmation of my position. It grows out of the acknowledged circumstances of the case, and, if fairly deduced, is evidence of the highest description. It is agreed by all the witnesses, that on the second day, the respondent manifested and expressed the utmost solicitude and anxiety for the counsel to proceed in the defence, and that he took "great pains" to induce them to do so. It is not doubted that he was sincere in this. Is it probable or possible, then, with these dispositions, and while he was endeavoring to persuade and to induce these gentlemen to return to the defence of their client, he would indulge himself in threats, in insults and menaces, which would necessarily confirm them in the abandonment of the cause, and defeat the acknowledged wish the judge had that they should return to it? But still we are told, and this first article of impeachment concludes with averring, that in consequence of the conduct of the respondent, Fries was deprived of his right of being heard and defended by his counsel. To refute this unfounded assertion, we need go no further than to the testimony of Messrs. Lewis and Dallas. They surely are the best judges of the motives of their own conduct. What reason do they give for denying Fries their aid, and advising him to refuse all other counsel? Because they had no hopes of success on a trial; because they believed the court had got into a difficulty where they were determined to keep them; because they thought they had a better chance to save their client's life, by the uses they might make of the novelty of the first day's proceeding, than they could have on

a full trial after this novelty was removed; the counsel, in short, withdrew from the defence of Fries, because they thought it would best serve him, and were not influenced by any other motive whatever. How does this testimony support the averment in the conclusion of the article, which boldly affirms, not that John Fries was saved, but that he was condemned to death, in consequence of not being heard by his counsel?

A very strange and unexpected effort has been made, sir, to raise a prejudice against the respondent on this occasion, by exciting or rather forcing a sympathy for John Fries. We have heard him most pathetically described as the ignorant, the friendless, the innocent John Fries. The ignorant John Fries! Is this the man who undertook to decide that a law, which had passed the wisdom of the Congress of the United States, was impolitic and unconstitutional; and who stood so confident of this opinion, as to maintain it at the point of the bayonet? He will not thank the gentleman for this compliment, or accept the plea of ignorance as an apology for his crimes. The friendless John Fries! Is this the man who was able to draw round himself a band of bold and determined adherents, resolved to defend him and his vile doctrines at the risk of their own lives, and of the lives of all who should dare to oppose? Is this the John Fries who had power and friends enough actually to suspend, for a considerable time, the authority of the United States over a large district of country, to prevent the execution of the laws, and to command and compel the officers, appointed to execute the law; to abandon the duties of their appointment, and lay the authority of the government at the feet of this friendless usurper? The innocent John Fries! Is this the man, against whom a most respectable grand jury of Pennsylvania, in 1799, found a bill of indictment for high treason; and who was afterwards convicted by another jury, equally impartial and respectable, with the approbation and under the direc-



tion of a judge, whose humanity and conduct on that very occasion have received the most unqualified praise of the honorable manager who thus sympathizes with Fries? Is this the John Fries, against whom a second grand jury, in 1800, found another bill for the same offence, founded on the same facts, and who was again convicted by a just and conscientious petit jury? Is this innocent German, the man who, in pursuance of a wicked opposition to the power and laws of the United States, and a mad confidence in his ability to maintain that opposition, rescued the prisoners duly arrested by the officers of the government and placed those very officers under duress; who with arms in his hands and menace on his tongue, arrayed himself in military order and strength, put to hazard the safety and peace of the country, and threatened us with all the desolation, bloodshed, and horror of a civil war; who, at the moment of his desperate attack, cried out to his infatuated followers, "come on! I shall probably fall on the first fire, then strike, stab and kill all you can?" In the fervid imagination of the honorable manager, the widows and orphans of this man, even before he is dead, are made, in hypothesis, to cry at the judgment-seat of God, against the respondent; and his blood, though not a drop of it has been spilled, is seen to stain the pure ermine of justice. I confess, sir, as a Pennsylvanian, whose native state has been disgraced with two rebellions in the short period of four years, my ear was strangely struck to hear the leader of one of them, addressed with such friendly tenderness, and honored with such flattering sympathy by the honorable manager.

It is not unusual, sir, in public prosecutions, for the accused to appeal to his general life and conduct in refutation of the charges. How proudly may the respondent make this appeal. He is charged with a violent attempt to violate the laws and constitution of his country, and to destroy the best liberty of his fellow-citizens. Look, sir, to his past life, to the constant course of his opinions and conduct, and the improbability of



the charge is manifest. Look to the days of doubt and danger; look to that glorious struggle so long and so doubtfully maintained for that independence we now enjoy, for those rights of self-government you now exercise, and do you not see the respondent among the boldest of the bold, never sinking in hope or in exertion, aiding by his talents and encouraging by his spirit; in short, putting his property and his life in issue on the contest, and making the loss of both certain, by the active part he assumed, should his country fail of success? And does this man, who thus gave all his possessions, all his energies, all his hopes to his country and to the liberties of this American people, now employ the small and feeble remnant of his days, without interest or object, to pull down and destroy that very fabric of freedom, that very government and those very rights, he so labored to establish? It is not credible; it cannot be credited, but on proof infinitely stronger than any thing that has been offered to this honorable court on this occasion. Indiscretions may have been hunted out by the perseverance of persecution; but I trust most confidently that the just, impartial and dignified sentence of this court, will completely establish to our country and to the world, that the respondent has fully and honorably justified himself against the charges now exhibited against him; and has discharged his official duties, not only with the talents that are conceded to him, but with an integrity infinitely more dear to him.

# SPEECH OF THOMAS ADDIS EMMET.

IN THE TRIAL OF

WILLIAM S. SMITH,

FOR

MISDEMEANORS,

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR  
THE NEW YORK DISTRICT, 1806.\*



GENTLEMEN OF THE JURY,

I ASSUME it as a fact which cannot be denied, and which is clearly to be inferred from the manner of conducting these proceedings, as well as from the parties who appear against the defendant, that this is emphatically a state prosecution. Impressed with a conviction of that fact, I did not think, at the commencement of this court, that it would have become my duty, during its sitting, to address a jury; for when the defendant came forward and averred upon oath, that he had acted with the knowledge and approbation of the executive; when he threw down the gauntlet of investigation on that point; when he indicated, as the witnesses, by whom he meant to prove his assertion, the very heads of departments themselves; when he made the utmost exertions to procure their attendance, and avowed his intention of appealing to their oaths, I confess I believed that the public prosecutor would not have deemed it conducive to the

\* The indictment against Mr. Smith charged him with being concerned in preparing a military expedition, or enterprise, which was set on foot in the city of New York, and was intended to be carried on against the dominions of Spain in South America, although the United States and Spain were at peace. It is sufficient here to observe, that the expedition, referred to, is generally known under the name of "Miranda's Expedition."—COMPILER.

honor of his cause, or the exalted character of the executive government, to urge on the trial of this state prosecution, till those witnesses, whose presence we have not been able to procure, and whose absence is attributed, without contradiction, and upon oath, to that very executive, had come in and deposed as to the facts alleged in the defendant's affidavit. I thought that the magnitude of those considerations would have overpowered the littleness of legal discussions; and that this cause would have been postponed by common consent, until it could be brought forward with all its circumstances; and a jury, and the world at large, enabled to form a correct judgment of the nature and justice of this prosecution. But it has been thought advisable to pursue a different line of conduct. We are forced on to trial, without the benefit of our whole means of defence; our witnesses are wilfully absent; our testimony is maimed and mutilated; we are tied and bound, and cast into the furnace; but still we hope that you, like the angel of God, will walk with us through the fire.

You, gentlemen, are taken from the mass of your fellow-citizens; it is therefore natural to apprehend that you may be influenced by those prejudices and misconceptions, which have been disseminated through the community; and it becomes my duty to endeavor to remove them. Against general Miranda, and the object of his expedition, I have heard and read some malignant calumnies, which only could have originated with mean and mercenary beings, who never yet sacrificed a selfish feeling to a public principle; whose hearts never sympathized with the sufferings of a slave; nor swelled with the mighty hope of delivering a nation. The district attorney, in his opening address to you, did not permit himself to adopt those calumnies in their entire extent; he is incapable of doing so, for his sentiments are liberal, and his manners mild. Sufficient, however, fell from him, to give to them somewhat of color and countenance, and to enlist your passions and prejudices against general



Miranda, and all concerned in his expedition, among whom he charges the defendant with being one. In particular, I remember, he termed Miranda a fugitive on the face of the earth, and characterized the object of the expedition, as something audacious, novel and dangerous. It has often struck me, gentlemen, as matter of curious observation, how speedily new nations, like new made nobility and emperors, acquire the cant and jargon of their station. Let me exemplify this observation, by remarking, that here, within the United States, which scarcely thirty years ago were colonies, engaged in a bloody struggle for the purpose of shaking off their dependence on the parent state, the attempt to free a colony from the oppressive yoke of its mother country, is called "audacious, novel and dangerous." It is true, general Miranda's attempt is daring, and if you will, audacious: but wherefore is it novel and dangerous. Because he, a private individual, unaided by the public succor of any state, attempts to liberate South America? Thrasybulus! expeller of the thirty tyrants! restorer of Athenian freedom! wherefore are you named with honor in the records of history? Because, while a fugitive and an exile, you collected together a band of brave adventurers, who confided in your integrity and talents—because, without the acknowledged assistance of any state or nation, with no commission but what you derived from patriotism, liberty and justice, you marched with your chosen friends, and overthrew the tyranny of Sparta, in the land that gave you birth. Nor are Argos and Thebes censured for having afforded you refuge, countenance and protection. Nor is Ismenias, then at the head of the Thebean government, accused of having departed from the duties of his station, because he obeyed the impulse of benevolence and compassion towards an oppressed people, and gave that private assistance which he could not publicly avow.

Of general Miranda it is true that he has been a wanderer from court to court, like Hannibal, suppli-

cating assistance for his country. He served in Florida, as your ally, during your revolutionary war; and there, from becoming interested in your contest, from contemplating the prospects that were opened to you by the possession of independence, he first conceived the project of emancipating South America. From your own altar of liberty, he caught the holy flame, which has since inextinguishably burned within his bosom; which has driven him from his home, his family, his social circle and domestic endearments; which has marked and checkered his past life with misery and misfortunes; but which I hope will hereafter make him the illustrious instrument of redeeming from bondage a noble country, highly favored by nature, but desolated by man—a wretched country, in which the blessings of heaven wither before the touch of tyranny.

When the armies of France seemed to be the vanguard of liberty in Europe, we find Miranda among her most distinguished generals. From the rulers of that republic he received promises and assurances of assistance for his long meditated project; but alas, gentlemen, the promises and assurances of governors and rulers are only calculated to deceive those who confide in them to their ruin! Spain having made peace with France, asked for the sacrifice of Miranda; and it seems, gentlemen, that when two nations are at peace, if one of them asks from the other for the sacrifice of an individual, the demand is irresistible. Miranda was dragged before a revolutionary tribunal; but that body, composed on somewhat of jury principles, feeling, as I hope every thing partaking of the nature of a jury always will feel, indignation at being made the instrument of such an abomination, loosed and liberated the devoted victim.

From France he passed over into England;

But to his country turned with ceaseless pain,  
And dragged, at each remove, a length'ning chain.

In England, had general Miranda consented to a transfer of dominion over his country, and to its being subjected to the British crown, he might have arrived to the highest military honors and fortune: but this man, who is accused of being a political intriguer, rejected with disgust the proposals of that intriguing cabinet, and took refuge in America,—“the world’s best hope.”

Here, having soon perceived the clouds which were gathering in our hemisphere, he fondly hoped that the storm would roll towards the Andes, and that the thunder of heaven was at length about to burst upon Spanish domination. With what assurances or promises, with what hopes or expectations he left our shores, it is not, perhaps, permitted to me to assert; but if his object be to give happiness to the wretched, and liberty to the slave, may he fulfil for his country the omen that is contained in his name—a name that surely indicates no common destiny. For in whatever clime the contest is to be carried on; whoever shall be the oppressor of the oppressed—may the Almighty Lord of Hosts strengthen the arms of those that fight for the freedom of their native land! May he guide them in their counsels, assist them in their difficulties, comfort them in their distresses, and give them victory in their battles!

Respecting the character of the defendant, colonel Smith, it is surely unnecessary, gentlemen, for me to trouble you with many words. He is an old revolutionary officer, that fought under the eyes, and lived in the family of the illustrious Washington, whose honorable certificates he bears, as the monuments of his fame. The war for independence, that kindled in him and general Miranda the same love of liberty, by its consequences, connected them in the strictest friendship. It is, therefore, natural to suppose, that colonel Smith may have become acquainted with many of the secret wishes and views of Miranda; but for whatever part he may have taken, if, in truth, he has taken any part in promoting the expedition of which you have heard so much, and whatever may



be your verdict, he has already suffered the anticipated punishment of removal from an office, which, to an exemplary son, brother, parent, husband and friend, was the sole support of himself and family.

I have thought it necessary, gentlemen, to premise these observations for the purpose of removing any unfavorable impressions, under which you may have hitherto labored; and also, because I trust they will induce you to scan, with a severer scrutiny, any allegations of criminality in men, whose objects and conduct, even as imputed to them, when judged of on the broad and universal principles of human rights, of morality and justice, and when estimated by their tendency to promote the improvement or happiness of mankind, must appear essentially meritorious and honorable.

It is not, however, gentlemen, exclusively on these broad and universal principles, that you are required to decide this cause. The indictment rests on more circumscribed and partial foundations, which, although they will not receive equal respect from the world at large, and will probably never be thought of by posterity, must still be submitted to your peculiar attention. The indictment is framed on a certain statute\* of the United States, concerning which, permit me to make a few preliminary observations. This statute, when first enacted, was merely temporary and for a very short duration. The attorney-general, in his opening, stated the present to be the first trial that has taken place on this section of the law, and that it was enacted to prevent certain enterprises set on foot by M. Genet, at that time the French minister, in favor of his own government. A somewhat different history of the law has been this day given, by which it would appear, that expeditions, similar to the present, were not within the contemplation of the legislature; it has

\* The statute, here referred to, was passed June 5, 1794, and was entitled "An act, in addition to an act for the punishment of certain crimes against the United States."—COMPILER.

been stated, and I believe correctly, that this law was made with a view to certain land expeditions, then forming, under the influence of French counsels, within the boundaries of the United States, against the Floridas. And it must be confessed, that the words of the act most peculiarly and naturally apply to military expeditions, or enterprises by land; neither the word maritime, nor any other substitute for it, having gained admission into the law. If, however, the attorney-general's statement be correct, and that this temporary statute was directed against M. Genet, let the singular circumstance, which marks this trial, be a beacon to warn political men against the unnecessary making of severe laws, from temporary or party motives: for who would have thought, when this clause was enacted, in the vice presidency of Mr. Adams, with direct hostility to M. Genet, that the first person who should be tried under it, would be the son-in-law of Mr. Adams; and that the first judge, who should preside on such a trial, would be the brother-in-law of M. Genet! And while I hold up this strange coincidence, as a warning to statesmen against the abuse of temporary power, let it be a caution to you also, gentlemen of the jury, not to be induced, by occasional or party feelings, to give to such a law as this an overstrained or severe construction; for if you do, God knows how soon it may recoil upon yourselves.

We are told, however, that this statute is entitled to peculiar respect, because it is declaratory of the law of nations; and as some sentiments of that kind were expressed by the court, I feel inclined to treat them with the greatest deference. To me, however, I confess it does not appear, that this statute has any characteristic of a declaratory law; it is temporary and penal; it fixes penalties not known to the law of nations, and in creating crimes, goes beyond that law; for it punishes the inchoate acts of parties, and almost their very intentions, although the law of nations confines its punishments to actual aggressions. If it were a declaratory law, wherefore should it be limit-

ed to a temporary duration? The law of nations is universal and perpetual; the fair exposition of its meaning should be so likewise. I have shown it was not intended to be perpetual; neither is it universal. What civilized state in the world has a statute similar to this? England has acts punishing crimes against the law of nations: but none in its nature or object analogous to this. America did very well without such a law, until a temporary circumstance, in the ebullition of party contest, gave it birth; and then Congress seemed to feel that in departing from the policy of other states, it was making a dangerous experiment; on no other principle can you account for its having limited the existence of the law to so short a period as two years. Neither is this statute necessary for enforcing the law of nations; that law is part of the common law of England and of the United States, and if any man offend against it, he may be punished, without the intervention of this statute.

[Mr. Emmet here made some observations in reply to an argument which had been advanced by one of the counsel for the prosecution.]

Before you proceed to a minute examination of the testimony in this cause, while the host of witnesses that were examined, are passing in review before your minds, you must doubtless be struck with the immense chasm that is caused by the absence of those officers of government, and other persons, whose attendance we have fruitlessly endeavored to procure. Perhaps that very absence renders them more decisive witnesses in our favor. Tacitus, the Roman historian, speaking of the funeral possession of Junia, a noble lady, in which, according to the custom of her country, the images of her ancestors were displayed, but in which, from compliment to the existing government, those of Brutus and Cassius were studiously kept back, remarks that Brutus and Cassius were pre-eminent above the rest, from the very circumstance, that their images were not to be seen. So in the course of this trial, I trust you will feel that the most pre-emi-



nent and important witnesses, those which in this state prosecution speak most conclusively to your consciences as honest men, are the heads of departments, and the other gentlemen upon whom we rested that broad defence, by which we were willing to abide and to disclaim any minute or strict constructions of the law. Now, however, that we are forced to take refuge within those minute and strict constructions, let me entreat you to keep in remembrance, that there is not only no moral guilt in the alleged expedition, with a concern in which we are charged; but that, when judged of by those unchangeable principles which we invoke, it is entitled to universal commendation; let me remind you that we are forced to answer this charge at the present moment under circumstances of very peculiar hardship; let me direct your attention, to those adversaries of every description, which appear marshalled against us; and let me call upon you, gentlemen, appointed as you are to be a bulwark in favor of the virtuous and innocent, to stand for them between prosecution and punishment; let me require you to avail yourselves of that unquestionable right, which, in a free country, I hope a jury will always possess, and which in a state prosecution I hope a jury will always exercise, of deciding in criminal cases, both upon the law and fact. Nor will your doing so, in the present instance, impose upon you any very difficult task; for no complicated questions of law can now arise. There is only one principle to be kept in mind, that penal statutes are to be construed strictly, so as to prevent the penalty's being inflicted upon any one, who has not offended against the rigorous construction of the law. In making that construction, gentlemen, you would derive no assistance from an intimacy with legal learning; a correct knowledge of your mother tongue and of the ordinary meaning of the words and phrases used, is amply sufficient. No adjudged cases or precedents can be cited as to the interpretation of this act; no assistance can be derived from the exposition that similar laws may have heretofore received; for no similar law ex-

ists in England or elsewhere. The maxim, that penal statutes are to be strictly construed, is indisputable; under the guidance of that polar principle examine the act; apply the evidence to each of its clauses; and I am much mistaken if you do not find yourselves fully competent to form a correct decision, as to the meaning and application of the law, without embarrassment or difficulty.

The attorney-general, in his opening address, adopted the arrangement which a perusal of the statute naturally suggests, by examining into the facts, which are to combine together to constitute the crime, in the order in which they are found in the act. My associates have pursued the same course; and it seems to me that you cannot adopt a better method of analyzing this law, and of examining whether all the facts that enter into the formation of the offence, be proved, than by considering every member of the sentence separately and in the order of construction. To proceed then thus, the defendant cannot be found guilty, unless it be proved to your satisfaction, that *within the territory or jurisdiction of the United States*, he *began*, or *set on foot*, or *provided*, or *prepared the means* of an expedition, which must be proved to be a *military* expedition or enterprise; it must also be proved that such *military* enterprise was to be carried on *from the United States* against the territory or dominions of some foreign prince or state; and it must lastly be proved, that such prince or state was one *with whom the United States were at peace*.

As to the first point, that whatever was done, was done within the territory or jurisdiction of the United States, there is no dispute. But what proof have you that the defendant either begun or set on foot the expedition, whatever it may have been? Colonel Smith, it appears, knew that Miranda had some plan to be put in execution; but the whole course of the testimony goes to prove that he declined being concerned in it, without the approbation of the President; how then can he be said to have begun or set on foot an expedition, which was planned by Miranda, and

which the defendant would take no part in till it was laid before and approved of by our executive? Besides, if you examine the facts in chronological order, it will be very apparent that colonel Smith did not begin or set any thing on foot.

[Mr. Emmet here commented upon the testimony relative to this point.]

Let us now consider what evidence there is, that this is a military expedition. Commerce in arms and ammunition was unrestrained, and vessels allowed to arm themselves as they thought fit, when the *Leander* sailed for Jacquemel in St. Domingo; with which island, a lucrative and beneficial trade has been for some time carried on. Moreover, all men are at liberty to leave the United States, and whether they are paid for going, or have subscribed their names to a contract, provided it be of a civil nature, the law is not broken. The gentleman, that furnished the ship and purchased the cannon, arms and ammunition, which were taken out in the *Leander*, as well as many other merchants, was long in that trade; and now for the first time, the military nature of the cargo has been made evidence of a crime. It is fully proved to you, gentlemen, that the *Leander* sailed *bona fide* and in fact from this to St. Domingo; and that the persons, who went out in that vessel, were to be considered as passengers; and that after they arrived there, they were at liberty, if they thought fit, to return back. What evidence does this furnish of a military expedition's being fitted out from this port; even supposing that, at St. Domingo, when the defendant had no longer any connexion with, or control over it, it may have assumed a military appearance? As between New York and Jacquemel, there is no evidence not perfectly reconcilable with commercial objects; and no further than that port, does the defendant appear to have any concern with providing, or preparing, or setting any thing on foot. The men who went in the *Leander*, went to St. Domingo as passengers, in a civil capacity; it was not until after their arrival



there, that they exchanged their liberty for the submission of soldiers; and until they had consented so to do, men cannot be said, under the strict construction requisite for a penal statute, to have been provided for a military expedition. Therefore, on this point also, the evidence for the prosecution has failed to attach any criminality to colonel Smith.

The next question that presents itself for consideration, taking the statute for our guide, is, supposing you have evidence enough, independent of extrajudicial rumors, to make you say the ultimate object of this expedition is military, yet does it come within the description of a military expedition to be carried on from the United States against any foreign prince? In order to make you perceive more clearly the importance of the words "from thence," in the statute, I shall follow the example of my learned friend who opened our defence, and read the section without those words, "if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on against the territory or dominions of any foreign prince," &c. If this were the law, it would undoubtedly comprehend the preparing and providing within the United States, of the means for a military expedition; even though those means were to be transported from the United States to some other place, and the military expedition to be carried on, from that place, against the dominions of a foreign prince. Such is our case, if you should think it proved that the expedition was military; and were the law such as I have just read it, you would be forced, as far as relates to this point, to find against the defendant. But the legislature did not think fit to take cognizance of the transportation of warlike preparations from the United States to any other place, even though they were there to be used as the means for carrying on a military expedition against a foreign prince. It confined the penalties of the law to those cases where the military expedition

was to be carried on, immediately, and in the first instance, from the United States; and therefore inserted the emphatic and restrictive words "to be carried on from thence;" that is, to sail directly from here against the foreign prince or nation. No such thing was done in the expedition under your consideration; for the *Leander* sailed with some arms and ammunition, and with some passengers, to St. Domingo. There, and not before, the passengers were, if they chose, to enter military service, and to receive commissions; if they did not choose so to do, they were to have their expenses paid, and passages provided for them back to the United States. At St. Domingo, also, the *Leander* was to be joined by the *Emperor* and *Indostan*, and two schooners; and the whole, when organized into a military expedition, was to proceed from thence against the Caraccas. This, however, it is said, is carrying on a military expedition from the United States against the Caraccas, *via* St. Domingo. Let me repeat the question already put by one of my associates; would an insurance on a voyage from New York to the Caraccas be violated by the vessel's going to St. Domingo? As merchants, you can answer that question. Why should going to St. Domingo affect the insurance? Because it is no longer the voyage insured: a voyage from New York to the Caraccas must be direct from the one place to the other, and is not the same as a voyage from New York to the Caraccas, *via* St. Domingo. Remember, then, that a penal statute must receive a strict construction, and what would not be a fair and sufficient description, in a mercantile instrument, of an enterprise to be carried on from one place to another, cannot be sufficient to satisfy the strictness of a penal law.

But the force of our reasoning, on this point, is infinitely strengthened by the circumstance, that the *Leander* went to Jacquemel, not merely for the purpose of touching there, but to make all the military equipments, (as the very witnesses for the prosecution depose,) and to rendezvous with other ships, that



were to be jointly concerned in the projected military expedition. Let us test this question, not only by the mercantile language of insurance, but also, (as the enterprise is said to be military,) by the military acceptance of words. Suppose a commander-in-chief ordered several detachments, from different points, to rendezvous at a particular place, and having made the necessary arrangements, to proceed from thence against an enemy's post. Suppose the English minister directed embarkations from Portsmouth, Falmouth, and the Cove of Cork, that they should severally proceed from those places to the island of Barbadoes, and having joined forces there, that they should make a descent upon Caraccas; would it not be an expedition to be carried on from the place of rendezvous, Barbadoes, for instance, and not from any one of the places whence the detachment proceeded? So in our case, the expedition was to be carried on, not from New York, from whence the *Leander* sailed, but from Jacquemel, where all the forces were to collect, by previous agreement, and from which the military departure for the Caraccas was to be taken.

Some other considerations place this matter beyond a doubt. It is proved that when the *Leander* sailed from New York, the arms, &c. were in such bad order that she was in no condition to undertake any military operations; and it further appears, that every person who went out in that vessel, whatever his expected rank might be, went as a voluntary passenger to a friendly island, where he was to be at liberty to stay or return; or, if he preferred doing so, to enter into a military line, to enrol, and if he was an officer, to receive his commission. Surely, then, the friendly island, where the arms were to be put in proper order for military purposes, and where the passengers were to change their condition, and become soldiers, is the place where the expedition is to be considered as assuming a military character; and from that place you must consider it as carried on against the object of attack. The construction and force which I have



given to those words, "to be carried on from thence," seem to me unanswerable; and in a case where so many motives should induce you to lean strongly towards an acquittal, you will rejoice at having found a resting place, on which your consciences may repose; and at the opportunity of absolving a man, who is free from moral guilt, and who, at the best, has been most rigorously dealt with.

There is yet another point for your consideration: supposing all the other requisites of the act to be established against the defendant, which is the very reverse of the truth, yet the expedition must be carried on against a nation "with whom the United States are at peace." This topic has already undergone so much discussion, that the force of our observations must have long since been impressed on your minds; I shall therefore be very brief. It is acknowledged that there are two kinds of war; one regularly proclaimed by the governments of two countries, and one actually existing *de facto* by the hostile conduct of one country against another. So peace, the opposite of war, must be capable of receiving two explanations. Now, keeping in remembrance the maxim I have so often impressed upon your minds, that penal statutes are to be strictly construed, and that every word, employed in describing the offence, is to be received in the sense most favorable to the accused, it necessarily follows, that, if one of the significations of the word "peace," will take the defendant's case out of the statute, that signification must be preferred. It would be sufficient for me to show, that, in common parlance, and the ordinary intercourse of life, that word is frequently used in the sense for which I contend. But I shall go further, and show, that even the Congress, which passed this law, has, in its legislative acts, employed the word in the same way. For that purpose let me request your attention to an act passed the 27th of March, 1794, chap. 12, entitled "an act to provide a naval armament," (vol. 3, p. 24.) It begins by reciting, that "the depredations, committed

by the Algerine corsairs on the commerce of the United States, render it necessary that a naval force should be provided for its protection." The act declares no war; Congress did not exercise its constitutional function of declaring war; no power was even given to the President of making reprisals; but only an authorization to purchase or provide, and man four ships. The act then concludes, "that if a peace shall take place between the United States and the regency of Algiers, no further proceeding shall be had under this act." If a peace shall take place! Where was the war, without a declaration by Congress? How did it originate? Not in the manner indicated by the constitution; nor in the provisions of that law; but only in the depredations committed by the Algerines on the American commerce. Here, then, is a legislative acknowledgment, that depredations of that kind may destroy a state of peace; and that Congress sometimes use that word in a sense no way opposed to war declared according to the forms of the constitution. Please to observe, too, that this act was passed on the 27th of March, 1794, and that the law, on which the defendant is indicted, was passed on the 5th of June, of that year. We only ask you, then, to construe the word "peace," in the statute of the 5th of June, in the same sense that Congress manifestly employed it on the 27th of March preceding—as expressing a state which is destroyed, with respect to any foreign power, by the depredations of that power upon our commerce; and of course, by any unwarrantable hostile aggressions. But the counsel on the other side say, there cannot be war, under the terms of the constitution, unless it be declared by Congress. Here they entrench themselves; but how do they refute the conclusion, which results from the statute I have just alluded to? In truth, it seems to me, that the constitution is very unnecessarily and incorrectly brought into this discussion; and that any inferences from it are perfectly inapplicable. That instrument was formed to prevent the encroachments of one branch



of the government upon the others, and of all upon the people; but it had no reference to any thing except the limitation of the powers of the public functionaries. The President undoubtedly cannot, by his own authority, place the country in a state of war; but does it follow from thence, that any other country cannot destroy the state of peace between itself and us, by its actual aggressions? That is a thing *de facto*, not depending on the clauses of our constitution; and in that light it was considered by the Congress, which passed both this law and the law against the Algerine depredations. Suppose a military expedition had been fitted out by individuals, to be carried on from the United States, against the Algerines, during the existence of that law, would the district attorney have gravely contended, in the face of its last clause, that the regency of Algiers was at peace with the United States, because Congress had not formally declared war against it? The true construction of the statute, on which the defendant is indicted, I take to be this—it is meant to go further than the law of nations; but for whom? For those nations, whose unequivocal amity and friendly dispositions towards us, entitle them to something more advantageous than the bare benefit of the law of nations—those who preserve only a formal peace, while they are inflicting the injuries of war, do not deserve, and shall not enjoy the privileges which we confer, by our own code, upon sincerely friendly, and therefore favored states.

This brings us to consider what has been the conduct of Spain towards the United States. The district attorney admitted that he should be under the necessity of proving every thing that enters into the statutory description of this offence, and among other things that the United States were at peace with Spain. In the course of the trial, however, he has offered no proof of that disputable fact: not even by reading the magical words which compose the first article of the treaty of San Lorenzo. I beg leave, therefore, to propose to him this dilemma. Either there is no proof of



which you, gentlemen, as jurors, can take cognizance, that the United States were at peace with Spain, and of course the defendant must be acquitted; or the state of the two countries, as to peace or war, is a matter on which the jury is warranted to form an opinion, from circumstances of public notoriety; and then, of course, the discussion of those circumstances of public notoriety is open to us; notwithstanding the court judged fit to reject, as evidence, the President's message and the public documents, by which we offered to prove the relative state of the two countries. In the absence of proof, on the part of the prosecution, as to the existence of peace, let me state a case by way of hypothesis. Suppose Spain had made encroachments upon our territory, had captured our citizens upon our own boundaries, and had committed depredations on our commerce, such as, by inference, constituted the Algerine war, could it be said that we were at peace under circumstances that Congress itself declared destroyed peace between the United States and Algiers? Has the testimony for the prosecution proved that a state of things different from this existed?—and it should prove every thing necessary for the conviction of the defendant. But it will probably be at present contended on the other side, that you may ground your verdict as to this point, on public notoriety—if so, I ask you, is it not publicly notorious, that what I have just now hypothetically laid before you, was in truth, the real conduct of Spain? The district attorney, in his opening speech, said that this prosecution was to do justice between Spain and the United States. By this statement I think he accurately arranged the parties concerned, and justly placed the United States on the side of the defendant. Spain is the prosecutrix; she has come into your courts, saying she was at peace, while she was making you feel the calamities of war. She asks from you the benefit of one of your own peculiar laws, such as is not to be found in the code of any other nation, which was enacted from internal considerations, and in favor of other states, that observe towards us a conduct unequivocally friendly;

and she asks from you this gratuitous favor, as a right, while your territories are yet marked by her unequivocally hostile aggressions. Let her take the benefit of the law of nations against your citizens, as she would be obliged to do against British subjects, if they had pursued a similar conduct. The executive disavows their acts, and leaves the individuals, if taken, without national protection; surely such disavowal and abandonment on the part of our executive is an ample sacrifice to the etiquette of courts. Suppose an indictment on this statute had been framed in the Mississippi territory, against any brave Americans, who, without the orders of government, might have made a military expedition within the Spanish lines to rescue the Kelpers. The construction of the law that would be applicable to their case in that country, is equally applicable to the case of the defendant in New York. What then, let me ask you, would be the astonishment and indignation of a jury there, if the public prosecutor informed them, that notwithstanding these outrages were unatoned for, and perhaps likely to be repeated, yet it was expedient to sacrifice those gallant adventurers to her resentment. Would they not, by their verdict, teach the government to answer thus, to such an insolent demand on the part of Spain? Before you ask the sacrifice of American citizens, restore those you have carried away, abandon our territories, make satisfaction for your depredations on our property and commerce, renounce your hostile plans; and after you have purged away your own offences, should any new injuries be done to you, then you shall enjoy the benefit of all our laws. Let your verdict give government the same instructive lesson; you are the protectors of a fellow-citizen against the vindictive oppression of foreign states; you have the power of resisting their insolent demands; you have nothing to do with their vapping menaces; to them I trust government has already replied, that America adopts Fingal's advice to the son of Ossian—never seek the battle with the foe—nor shun it when it comes.

I have thus, gentlemen, examined the statute at



some length, and given to it a construction, which if you believe it correct, will undoubtedly entitle the defendant to an acquittal. I shall give you an additional reason why you should believe in the correctness of my construction. General Miranda's expedition was a subject of general conversation in this city some time before it sailed; it was carried on under the eyes of the government, and known to many, whose political communications with Washington city, are no doubt accurate and frequent. This circumstance, even exclusive of the inferences that must arise from the non-attendance of the heads of departments, is sufficient to convince you that the expedition was carried on with the knowledge of government. Why then was it not prevented? Most assuredly because the executive saw that it could be carried on, and indeed was carrying on, consistently with the laws of the United States. If it were otherwise, if the expedition were a violation of the law, with such ample time for deliberation and action, would not the President have exercised the power vested in him by the seventh section of this statute, and hindered the sailing of the *Leander*.

[Mr. Emmet referred to the testimony on this point.]

The expedition was therefore known at Washington, six or seven weeks before it took place, and no effort made to stop it. Surely, then, the President and secretary of state, and other officers of government, considered it as perfectly consistent with our laws. I confess, gentlemen, I attach very great weight to the opinions of those gentlemen; I sincerely esteem and respect them all; Mr. Jefferson, I believe to be not only an enlightened patriot and a consummate statesman, but also to comprise in his extensive information a very accurate knowledge of the law. He had learned, I presume, that the *Leander* was bound, in the first instance, for Jacquemel; he knew that the transporting of arms, ammunition and military stores to St. Domingo was not prohibited; he knew an Ame-



rican as well as a foreigner might travel; he probably considered, as I do, every person that went in the *Leander*, as in the eye of the law, only a traveller, till he should assume a military character in a foreign port; he saw that no military expedition was to be carried on from the United States; and he felt that there was nothing in our relations to Spain which could lay claim to the extraordinary exertion of peculiar friendship on the part of the United States; nor any thing in the object of the expedition itself, that could alarm his benevolence or patriotism. This view of the subject does justice to all parties; it marks the wisdom of the President in abstaining from interfering with the expedition; it marks the prudence of the chief by whom it was conducted, and the cautious observance of the law by those who acted under him; and it will mark your discrimination, justice and integrity, if you adopt this construction of the statute, and give a verdict of acquittal.

I could wish, before I conclude, to make another observation. This trial has by some, been considered as a party question, and I understand that my conduct, in the defence of the gentleman indicted, has been talked of, by the weak and ignorant, as something like a dereliction of my professed political principles. I pity such party bigots, and have only to assure them, that no feelings such as they possess, shall ever weaken my zeal for my client. But as to my political principles, they are a subject on which I am too proud to parley, or enter into a vindictory explanation with any man. In me, republicanism is not the result of birth, nor the accidental offspring of family connexions—it is the fruit of feeling and sentiment, of study and reflection, of observation and experience—it is endeared to me by sufferings and misfortunes. I see gentlemen on that jury, between whose political principles and mine, there is not a shade of difference—we agree as to the hands to which we would confide the offices, honors, power and wealth of the republic.

I trust we also agree in this, that nothing can be more injurious to the due administration of the law, than that political considerations or party prejudices should be permitted to ascend the bench, or enter into the jury-box. That pollution of justice has given rise to many of those abominations and horrors which have disgraced and desolated Europe. I adjure you, do not mingle the spirit of party with the wholesome medicine of the law; for if you do, most assuredly, sooner or later, even-handed justice will commend the ingredients of the poisoned chalice, to your own lips. I entreat you, exercise your prerogatives and discharge your duty in the spirit of uprightness and mercy—do not suffer the defendant to be sacrificed as a sin-offering or a peace-offering; and if he is to be made the scape-goat, on which are to be fixed the faults of others, give him, at least, the privilege of escape.

# SPEECH OF SAMUEL DEXTER.

IN THE TRIAL OF

THOMAS O. SELFRIDGE.

FOR KILLING

CHARLES AUSTIN:

BEFORE THE SUPREME COURT OF THE COMMONWEALTH  
OF MASSACHUSETTS, 1806.



MAY IT PLEASE YOUR HONOR, AND YOU GENTLEMEN OF THE JURY:

It is my duty to submit to your consideration some observations in the close of the defence of this important and interesting cause. In doing it, though I feel perfectly satisfied that you are men of pure minds, yet I reflect with anxiety, that no exertion or zeal on the part of the defendant's counsel can possibly insure justice, unless you likewise perform your duty. Do not suppose that I mean to suggest the least suspicion with respect to your principles or motives. I know you to have been selected in a manner most likely to obtain impartial justice; and doubtless you have honestly resolved, and endeavored to lay aside all opinions which you may have entertained previous to this trial. But the difficulty of doing this, is perhaps not fully estimated; a man deceives himself oftener than he misleads others; and he does injustice from his errors, when his principles are all on the side of rectitude. To exhort him to overcome his prejudices, is like telling a blind man to see. He may be disposed to overcome them, and yet be unable because they are unknown to himself. When prejudice is once known, it is no longer prejudice, it becomes corruption; but so long as it is not known, the possessor cherishes it without guilt; he feels indignation



for vice, and pays homage to virtue; and yet does injustice. It is the apprehension that you may thus mistake, that you may call your prejudices principles, and believe them such, and that their effects may appear to you the fruits of virtue, which leads us so anxiously to repeat the request, that you would examine your hearts, and ascertain that you do not come here with partial minds. In ordinary cases, there is no reason for this precaution. Jurors are so appointed, by the institutions of our country, as to place them out of the reach of improper influence, on common occasions; at least as much so as frail humanity will permit.

But when a cause has been a long time the subject of party discussion; when every man among us belongs to one party or the other, or at least is so considered; when the democratic presses, throughout the country, have teemed with publications, fraught with appeals to the passions, and bitter invective against the defendant; when, on one side, every thing has been done, that party rage could do, to prejudice this cause; and, on the other, little has been said in vindication of the supposed offender, though, on one occasion. I admit that too much has been said; when silence has been opposed to clamor, and patient waiting for a trial to systematic labor to prevent justice; when the friends of the accused, restrained by respect for the laws, have kept silence, because it was the exclusive right of a court of justice to speak; when no voice has been heard from the walls of the defendant's prison, but a request that he may not be condemned without a trial; the necessary consequence must be, that opinion will progress one way; that the stream of incessant exertion will wear a channel in the public mind; and the current may be strong enough to carry away those who may be jurors, though they know not how, or when, they received the impulse that hurries them forward.

I am fortunate enough not to know, with respect to most of you, to what political party you belong. Are

you republican federalists? I ask you to forget it: leave all your political opinions behind you; for it would be more mischievous, that you should acquit the defendant from the influence of these, than that an innocent man, by mistake, should be convicted. In the latter case, his would be the misfortune, and to him would it be confined; but in the other, you violate a principle, and the consequence may be ruin. Consider what would be the effect of an impression on the public mind, that in consequence of party opinion and feelings, the defendant was acquitted. Would there still be recourse to the laws, and to the justice of the country? Would the passions of the citizen, in a moment of frenzy, be calmed by looking forward to the decision of courts of law for justice? Rather every individual would become the avenger of imaginary transgression. Violence would be repaid with violence; havoc would produce havoc; and instead of a peaceable recurrence to the tribunals of justice, the spectre of civil discord would be seen stalking through our streets, scattering desolation, misery and crimes.

Such may be the consequences of indulging political prejudice on this day; and if so, you are amenable to your country and your God. This I say to you who are federalists; and have I not as much right to speak thus to those who are democratic republicans? That liberty, which you cherish with so much ardor, depends on your preserving yourselves impartial in a court of justice. It is proved by the history of man, at least of civil society, that the moment the judicial power becomes corrupt, liberty expires. What is liberty, but the enjoyment of your rights, free from outrage or danger? And what security have you for these, but an impartial administration of justice? Life, liberty, reputation, property and domestic happiness, are all under its peculiar protection. It is the judicial power, uncorrupted, that brings to the dwelling of every citizen, all the blessings of civil society, and makes it dear to man. Little has the private citizen to do with the other branches of government. What,

to him, are the great and splendid events that aggrandize a few eminent men and make a figure in history? His domestic happiness is not less real, because it will not be recorded for posterity; but this happiness is his no longer than courts of justice protect it. It is true, injuries cannot always be prevented; but while the fountains of justice are pure, the sufferer is sure of a recompense.

Contemplate the intermediate horrors and final despotism, that must result from mutual deeds of vengeance, when there is no longer an impartial judiciary, to which contending parties may appeal, with full confidence that principles will be respected. Fearful must be the interval of anarchy; fierce the alternate pangs of rage and terror, till one party shall destroy the other, and a gloomy despotism terminate the struggles of conflicting factions. Again, I beseech you to abjure your prejudices. In the language once addressed from heaven to the Hebrew prophet, "Put off your shoes, for the ground on which you stand is holy." You are the professed friends, the devoted worshippers of civil liberty; will you violate her sanctuary? Will you profane her temple of justice? Will you commit sacrilege while you kneel at her altar?

I will now proceed to state the nature of the charge on which you are to decide, and of the defence which we oppose to it; then examine the evidence, to ascertain the facts, and then inquire what is the law applicable to those facts.

The charge is for manslaughter; but it has been stated in the opening, that it may be necessary to know something of each species of homicide, in order to obtain a correct idea of that which you are now to consider.

Homicide, as a general term, includes, in law, every mode of killing a human being. The highest and most atrocious is murder; the discriminating feature of which is previous malice. With that the defendant is not charged; the grand jury did not think that by the evidence submitted to them, they were authorized



to accuse him of that enormous crime. They have, therefore, charged him with manslaughter only.

The very definition of this crime, excludes previous malice ; therefore it is settled, that there cannot, with respect to this offence, be an accessory before the fact ; because the intention of committing it is first conceived at the moment of the offence, and executed in the heat of a sudden passion, or it happens without any such intent, in doing some unlawful act. It will not be contended that the defendant is guilty of either of these descriptions of manslaughter. Neither party suggests that the defendant was under any peculiar impulse of passion at the moment ; and had not time to reflect ; on the contrary, he is said to have been too cool and deliberate. The case in which it is important to inquire, whether the act was done in the heat of blood, is where the indictment is for murder, and the intent of the defence is to reduce the crime from murder to manslaughter ; but Selfridge is not charged with murder. There is nothing in the evidence that has the least tendency to prove an accidental killing, while doing some unlawful act. It is difficult to say, from this view of manslaughter, when compared with the evidence, on what legal ground the defendant can be convicted ; unless it be, that he is to be considered as proved guilty of a crime which might have been charged as murder, and by law, if he now stood before you under an indictment for murder, you might find him guilty of manslaughter, and therefore you may now convict him.

This does not appear to be true ; for the evidence would not apply to reduce the offence from murder to manslaughter, on either of the aforementioned grounds. Perhaps it may be said, that every greater includes the less, and therefore, manslaughter is included in murder ; and that it is on this principle that a conviction for manslaughter may take place on an indictment for murder. I will not detain you to examine this, for it is not doing justice to the defendant to admit, for a moment, even for the sake of argument,

that the evidence proves murder. Our time will be more usefully employed in considering the principles of the defence. Let it be admitted, then, as stated by the counsel for government, that, the killing being proved, it is incumbent on the defendant to discharge himself from guilt. Our defence is simply this, that the killing was necessary in self-defence; or, in other words, that the defendant was in such imminent danger of being killed, or suffering other enormous bodily harm, that he had no reasonable prospect of escaping, but by killing the assailant.

This is the principle of the defence stripped of all technical language. It is not important to state the difference between justifiable and excusable homicide, or to show to which the evidence will apply; because, by our law, either being proved, the defendant is entitled to a general acquittal.

Let us now recur to the evidence and see whether this defence be not clearly established.

[Mr. Dexter here went into a minute examination of the evidence, after which, he proceeded to inquire what the law was applicable to the facts established by the evidence. He then continued his speech as follows.]

We have now taken a view of the facts, and the positive rules of law, that apply to them; and it is submitted to you with great confidence, that the defendant has brought himself within the strictest rules, and completely substantiated his defence, by showing that he was under a terrible necessity of doing the act; and that by law he is excused. It must have occurred to you, however, in the course of this investigation, that our law has not been abundant in its provisions for protecting a man from gross insult and disgrace. Indeed it was hardly to be expected, that the sturdy hunters, who laid the foundations of the common law, would be very refined in their notions. There is in truth much intrinsic difficulty in legislating on this subject. Laws must be made to operate equally on all members of the community; and such is the difference

in the situations and feelings of men, that no general rule, on this subject, can properly apply to all. That, which is an irreparable injury to one man, and which he would feel himself bound to repel even by the instantaneous death of the aggressor, or by his own, would be a very trivial misfortune to another. There are men, in every civilized community, whose happiness and usefulness would be forever destroyed by a beating, which another member of the same community would voluntarily receive for a five dollar bill. Were the laws to authorize a man of elevated mind, and refined feelings of honor to defend himself from indignity by the death of the aggressor, they must at the same time furnish an excuse to the meanest chimney sweeper in the country for punishing his sooty companion, who should fillip him on the cheek, by instantly thrusting his scraper into his belly. But it is too much to conclude, from this difficulty in stating exceptions to the general rule, that extreme cases do not furnish them. It is vain, and worse than vain, to prescribe laws to a community, which will require a dereliction of all dignity of character, and subject the most elevated to outrages from the most vile. If such laws did exist, the best that could be hoped, would be, that they would be broken. Extreme cases are in their nature exceptions to all rules; and when a good citizen says, that, the law not having specified them, he must have a right to use his own best discretion on the subject; he only treats the law of his country in the same manner in which every Christian necessarily treats the precepts of his religion. The law of his master is, "resist not evil;" "if a man smite thee on one cheek, turn to him the other also." No exceptions to these rules are stated; yet does not every rational Christian necessarily make them? I have been led to make these observations, not because I think them necessary in the defence of Mr. Selfridge; but because I will have no voluntary agency in degrading the spirit of my country. The greatest of all public calamities, would be a pusillanimous spirit, that



would tamely surrender personal dignity to every invader. The opposing counsel have read to you, from books of acknowledged authority, that the right of self-defence was not given by the law of civil society, and that, that law cannot take it away. It is founded then on the law of nature, which is of higher authority than any human institution. This law enjoins us to be useful, in proportion to our capacities; to protect the powers of being useful, by all means that nature has given us, and to secure our own happiness, as well as that of others. These sacred precepts cannot be obeyed without securing to ourselves the respect of others. Surely, I need not say to you, that the man, who is daily beaten on the public exchange, cannot retain his standing in society, by recurring to the laws. Recovering daily damages will rather aggravate the contempt that the community will heap upon him; nor need I say, that when a man has patiently suffered one beating, he has almost insured a repetition of the insult.

It is a most serious calamity, for a man of high qualifications for usefulness, and delicate sense of honor, to be driven to such a crisis, yet should it become inevitable, he is bound to meet it like a man, to summon all the energies of the soul, rise above ordinary maxims, poise himself on his own magnanimity, and hold himself responsible only to his God. Whatever may be the consequences, he is bound to bear them; to stand like mount Atlas,

“ When storms and tempests thunder on his brow,  
And oceans break their billows at his feet.”

Do not believe that I am inculcating opinions, tending to disturb the peace of society. On the contrary, they are the only principles that can preserve it. It is more dangerous for the laws to give security to a man, disposed to commit outrages on the persons of his fellow-citizens, than to authorize those, who must otherwise meet irreparable injury, to defend themselves

at every hazard. Men of eminent talents and virtues, on whose exertions, in perilous times, the honor and happiness of their country must depend, will always be liable to be degraded by every daring miscreant, if they cannot defend themselves from personal insult and outrage. Men of this description must always feel, that to submit to degradation and dishonor, is impossible. Nor is this feeling confined to men of that eminent grade. We have thousands in our country who possess this spirit; and without them we should soon deservedly cease to exist as an independent nation. I respect the laws of my country, and revere the precepts of our holy religion; I should shudder at shedding human blood; I would practise moderation and forbearance, to avoid so terrible a calamity; yet should I ever be driven to that impassable point, where degradation and disgrace begin, may this arm shrink palsied from its socket, if I fail to defend my own honor.

It has been intimated, that the principles of christianity condemn the defendant. If he is to be tried by this law, he certainly has a right to avail himself of one of its fundamental principles. I call on you then to do to him, as in similar circumstances, you would expect others to do to you; change situations for a moment, and ask yourselves, what you would have done, if attacked as he was. And instead of being necessitated to act at the moment, and without reflection, take time to deliberate. Permit me to state, for you, your train of thought. You would say—this man, who attacks me, appears young, athletic, active and violent. I am feeble and incapable of resisting him; he has a heavy cane, which is undoubtedly a strong one, as he had leisure to select it for the purpose; he may intend to kill me; he may, from the violence of his passion, destroy me without intending it; he may maim or greatly injure me; by beating me he must disgrace me. This alone destroys all my prospects, all my happiness, and all my usefulness. Where shall I fly, when thus rendered contemptible? Shall I go abroad? Every

one will point at me the finger of scorn. Shall I go home? My children—I have taught them to shrink from dishonor; will they call me father? What is life to me, after suffering this outrage? Why should I endure this accumulated wretchedness, which is worse than death, rather than put in hazard the life of my enemy?

Ask yourselves whether you would not make use of any weapon that might be within your power to repel the injury; and if it should happen to be a pistol, might you not, with sincere feelings of piety, call on the Father of Mercies to direct the stroke.

While we reverence the precepts of christianity, let us not make them void by impracticable construction. They cannot be set in opposition to the law of our nature; they are a second edition of that law; they both proceed from the same author.

Gentlemen, all that is dear to the defendant, in his future life, is by the law of his country placed in your power. He cheerfully leaves it there. Hitherto he has suffered all that his duty as a good citizen required, with fortitude and patience; and if more be yet in store for him, he will exhibit to his accusers an example of patient submission to the laws. Yet permit me to say, in concluding his defence, that he feels full confidence that your verdict will terminate his sufferings.

*Selfridge was acquitted.*



# SPEECH OF JOHN WICKHAM,

IN THE TRIAL OF

AARON BURR, FOR TREASON,

IN PREPARING THE MEANS OF A MILITARY EXPEDITION  
AGAINST MEXICO, A TERRITORY OF THE KING OF  
SPAIN, WITH WHOM THE UNITED STATES WERE AT  
PEACE ;

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE  
DISTRICT OF VIRGINIA, 1807.



Mr. Wickham for the defendant, in support of a motion to arrest the evidence.

MAY IT PLEASE THE COURT,

THE counsel for the prosecution having gone through their evidence relating directly to the overt act charged in the indictment, and being about to introduce collateral testimony of acts done beyond the limits of the jurisdiction of this court, and it not only appearing from the proofs, but being distinctly admitted, that the accused, at the period when war is said to have been levied against the United States, was hundreds of miles distant from the scene of action, it becomes the duty of his counsel, to object to the introduction of any such testimony ; as, according to our view of the law on this subject, it is wholly irrelevant and inadmissible.

It is not without reluctance that this measure is resorted to. Our client is willing and desirous, that at a proper time, and on a fit occasion, the real nature of the transactions, which have been magnified into the crime of treason, should be fully disclosed ; and unless he be greatly mistaken, it is now in his power to ad-

duce strong and conclusive testimony, in direct opposition to that which has been relied on in behalf of the prosecution. But if we may calculate from the time that has been already consumed, in the examination of the small number of witnesses, that have yet been introduced, out of about one hundred and forty, that have been summoned on the part of the United States, it is hardly possible, that an opportunity will be afforded him of calling a single witness before this jury. Weeks, perhaps months, will pass away, before the evidence for the United States is closed; and at this unfavorable season, nothing is more likely than that the health of some one, and, perhaps, more of the jury, will be so far affected, by the climate and confinement, as to render it impossible to proceed with the trial. Should such an event happen, the cause must lie over, and our client, innocent, as we have a right to suppose him, may be subjected to a prolongation of that confinement, which is, in itself, a severe punishment. The jury, too, are placed under very unpleasant restraints, and it would be an act of injustice to them, as well as him, to acquiesce in a course of proceeding, which would draw out the trial to an immeasurable length; and which we conceive to be neither conformable to the rules of law, nor consistent with justice.

Hitherto the counsel for the United States have taken frequent occasion to declare their belief of the guilt of the accused. On the motion I am about to make, arguments, drawn from this topic, will have no application. The question will turn on abstract principles, which will neither be changed nor affected by his innocence or guilt. The foundation on which this prosecution must rest, and which I should hope, had not been seen or attended to by the counsel for the United States themselves, will be exposed to view; and it will be for them to determine, whether it shall be abandoned, or maintained by doctrines incompatible with our republican institutions, and utterly inconsistent with every idea of civil liberty.

In combating these doctrines, we shall, so far as we are able, support the cause not of our client alone, but of every citizen of the United States, and of future generations; for as to the establishment of the principle, it ought not to be considered as his cause alone, but as the cause of every member of the community and of posterity.

The first position I shall lay down, is that no person can be convicted of treason in levying war, who is not personally present at the commission of the act, which is charged in the indictment as constituting the offence.

The third section of the third article of the constitution of the United States, declaring that "treason shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and that "no person shall be convicted, unless on the testimony of two witnesses to the same overt act," there can be no doubt, if the words be construed according to their natural import, that it is necessary, in order to fix the guilt of the accused, to prove by two witnesses, that he committed an act of open hostility to the government, at the place charged in the indictment.

But artificial rules of construction, drawn from the common law and the usages of courts in construing statutes, are resorted to in order to prove that these words of the constitution are to be construed, not according to their natural import, but that an artificial meaning, drawn from the statute and common law of England, is to be affixed to them, totally different.

In the first place, I deny that any such rules of construction, however just they may be when applied to a statute, can be properly used, with reference to the constitution of the United States.

This instrument is a new and original compact between the people of the United States, embracing their public concerns in the most extensive sense; and is to be construed, not by the rules of art belonging to a particular science or profession, but, like a



treaty or national compact, in which the words are to be taken according to their natural import, unless such a construction would lead to a plain absurdity, which cannot be pretended in the present instance.

It being new and original and having no reference to any former act or instrument, forbids a resort to any other rules of construction than such as are furnished by the constitution itself, or the nature of the subject. If I be correct in this, there is an end to all further inquiry. It is not necessary to resort to artificial rules of construction. The words of the constitution, "levying (or making) war," are plain and require no nice interpretation; and with respect to the other clause, "adhering to their enemies," &c. it is a matter of no consequence here what may be its correct exposition, for the commonwealth has no enemies. The counsel for the United States will not contend that the words, used in their natural sense, can embrace the case of a person who never himself committed an act of hostility against the United States, and was not even present when one was committed.

But they will insist, that these words in the constitution are to have an artificial meaning, such as they contend has been given them in the courts in England; and that in that country, all persons aiding and abetting others in the act of levying war against the government, are guilty of treason, though not personally present.

I shall contend first, that, notwithstanding some *dicta* of law-writers to the contrary, no such rule has practically obtained in that country; and that the decisions, entitled to any respect, lead to an inference directly contrary.

And secondly, that if I be wrong in this, the principle, adopted there, cannot apply to treasons under the constitution of the United States.

[After endeavoring to substantiate his first position by reference to English statutes and adjudications, Mr. Wickham proceeded as follows.]

The object of the American constitution, was to perpetuate the liberties of the people of this country. The framers of that instrument well knew the dreadful punishments inflicted, and the grievous oppressions produced by constructive treasons in other countries, as well where the primary object was the security of the throne, as where the public good was the pretext. Those gentlemen well knew, from history, ancient as well as modern, that, in every age and climate, where the people enjoyed even the semblance of liberty, and where factions or parties existed, an accusation of treason, or a design to overturn the government, had been occasionally resorted to by those in power, as the most convenient means of destroying those individuals whom they had marked out for victims; and that the best mode of insuring a man's conviction, was to hunt him down as dangerous to the state. They knew that mankind are always the same, and that the same passions and vices must exist, though sometimes under different modifications, until the human race itself be extinct. That a repetition of the same scenes, which have deluged other countries with their best blood, might take place here, they well knew; and endeavored, as far as possible, to guard against the evil, by a constitutional sanction. They knew, that when a state is divided into parties, what horrible cruelties may be committed, even in the name and under the assumed authority of a majority of the people, and, therefore, endeavored to prevent them. The events, which have since occurred in another country, and the sufferings under Robespierre, show how well human nature was understood by those who framed our constitution.

The language, which they have used for this purpose, is plain, simple and perspicuous. There is no occasion to resort to the rules of construction to fix its meaning. It explains itself. Treason is to consist in levying war against the United States, and it must be public or open war: two witnesses must prove, that there has been an overt act. The spirit and ob-



ject of the constitutional provision are equally clear. The framers of the constitution, with the great volume of human nature before them, knew that perjury could easily be enlisted on the side of oppression; that any man might become the victim of private accusation; that declarations might be proved which were never made; and therefore they meant, as they have said, that no man should be the victim of such secret crimination: but that the punishment of this offence should only be incurred by those whose crimes are plain and apparent; against whom an open deed is proved.

Now let me ask the opposite counsel, what security is afforded, by the constitution, to the best or meanest man in this country, if the construction, on which they insist, be correct? and whether instead of a safeguard to the citizen, they do not reduce it to an unmeaning phrase? According to the construction on which they must insist, or abandon the prosecution, all that is wanted to fix the guilt of treason on any individual, is, that an insurrection shall have existed somewhere in the United States, no matter where. Observe, sir, that I am arguing on abstract principles, and not with a particular application. But suppose the government wished to destroy any man: they find him in Georgia; an insurrection happens in New Hampshire. This will suffice for the purpose, and if this cause go on they will be obliged to contend, that less will suffice; that an insurrection is not necessary; but that even a peaceable assemblage, going down the Ohio, is sufficient for the purpose. They merely undertake to prove the existence of an insurrection; that a number of people have committed an act of insurrection. The man, who is selected to be a victim, is dragged from one end of the continent to the other, before a judge, who is the creature of the government, appointed at the pleasure of the government, liable to be thrown out of office, if he offend the government; the cause comes on to trial; they prove an insurrection; and when once this insurrection or assemblage can be



proved by two witnesses, nothing remains but to connect with it the individual thus marked for destruction. And as this may be done by evidence of his secret acts, or even his declarations, he may be seized and hurried by force, from New Hampshire to Georgia, or to any part of the United States, which his accusers may choose as best fitted for their purpose. It is in vain that he may prove, he was not present when the offence, of which he is accused, was committed; that he never, at any period of his life, had been there; that the actors and the scene were alike unknown to him; wretches, who, from views of interest or revenge, are ready to further the views of his oppressors, will present themselves, and he may be convicted of treason, in levying open war against the government, with people whom he never saw, and at a place where he never was. Gentlemen may say, that this only shows, that the citizen may be equally the victim of false accusations of other offences; that it proves nothing, but that the innocent may be condemned on the testimony of perjured witnesses. In no other crime can a man be punished, except in the county or district where he committed the act. Let gentlemen mention for what other offence an individual may be tried in a different district from the one in which he did the act, which constitutes the essence of the crime. And admitting their principle, in its full force, what becomes of the constitutional provision on this subject? Where is the constitutional tribunal to try him, "an impartial jury of the state, wherein the offence has been committed?" It is reduced to a mere nullity. The constitution meant something; but according to this construction, it means nothing, and deceives, instead of affording any security. It may be objected, that treasonable conspiracies might thus go unpunished. To this, it is a sufficient answer, that they may be prosecuted and charged, according to the truth of the case. Here I will mention an authority, which shows the propriety and safety of limiting and fixing the definition of treason; and how much the English statute,

from which the words of our constitution are taken, has been approved of in that country. Hume's History of England, vol. 2, p. 487.

“ One of the most popular laws, enacted by any prince, was the statute which passed in the twenty-fifth year of this reign, and which limited the cases of high treason, before vague and uncertain, to three principal heads: conspiring the death of the king, levying war against him, and adhering to his enemies: and the judges were prohibited, if any other cases should occur, from inflicting the penalty of treason, without an application to parliament. The bounds of treason were, indeed, so much limited by this statute, which still remains in force without any alteration, that the lawyers were obliged to enlarge them, and to explain “ a conspiracy for levying war against the king, to be equal to a conspiracy against his life; and this interpretation, seemingly forced, has, from the necessity of the case, been tacitly acquiesced in.”

But it will be objected, that admitting the full force of this reasoning, it cannot avail us, as the point has been settled by a decision of the supreme court; and that argument must yield to authority.

At the same time that I deny the legislative effect of a decision of the supreme court, I will admit that it is entitled to the highest respect, as evidence of the law; and that the reason, which would warrant the court in departing from it, must be strong and apparent; but to entitle it to this respect, the decision must have turned upon the very point in issue: and if the case should ever occur of an anomalous decision of that court, in opposition to known and established rules of law, I have no hesitation in saying, that it ought not to form a rule for this court. A mere *dictum* or an expression thrown out in argument without consideration, (or if there were consideration, yet if the point in issue did not turn upon it,) ought not to be deemed an authority.

There is, however, no such decision; the case never has occurred; for, until the present instance, there



has been no attempt, in the courts of the United States, to convict an individual for treason, who was not actually on the spot, when the act, charged in the indictment, was committed.

I will admit that in the case of Messrs. Bollman and Swartwout, which was only a question of commitment, decided by the supreme court, there is a *dictum*, which is reported to have fallen from the chief justice in delivering the opinion of the court, that is in opposition to the doctrine I have been contending for. But the decision of the court did not turn on that point; a determination of that question, one way or the other, would have no effect on the judgment: it was therefore extrajudicial. Your Honor can set me right if I be mistaken; but I believe the point, now relied on by the prosecution, either did not come before the court, or was very slightly touched on by the bar; it was a mere *dictum* of the judges stated *arguendo*, an *obiter* opinion delivered without argument, and not necessary to have been decided. A decision on the very point in controversy is evidence of the law; but an *obiter* opinion, a mere *dictum* or decision, on a point not before the court, is no authority at all. Points of law, not immediately arising on the question, are frequently mentioned by judges, by way of illustration or explanation; and such opinions never have the force of precedent. The question before the supreme court was, who were concerned in the conspiracy, and who were not; but the point now before this court, never came before the supreme court; for, as I have already observed, this is the first attempt in this country, to convict a person of treason, who was not present when the act was committed. It is well known, that Vigol and Mitchel, the only persons of the multitude concerned in the western insurrection in 1794, who were convicted and sentenced to die, (but were afterwards pardoned,) though the most actively engaged, were mere instruments instigated and persuaded by others: but what was the conduct of the government of the United States on that occasion? Were those who



fomented, advised or encouraged the insurrection, but were not actors in it, indicted and prosecuted? No, actors, and actors only, were indicted; and I trust that this attempt, which is as novel as it is dangerous, will never be sanctioned by this court. And if I know my own mind, I feel a better and more powerful motive than professional duty, in endeavoring to prevent the establishment of their doctrine; a most ardent desire to avert from my country, my family and myself, an evil so very pernicious and repugnant to every principle of civil liberty. I would unite with themselves, with as much zeal and energy as possible, in opposing it; for if it were to be sanctioned as a confirmed doctrine, it might be justly said, that, however perfect in theory, our government was a practical tyranny, at the pleasure of those who have the administration of the government in their hands. It is on these grounds, that I have argued this cause; not solely in defence of my client, but for the sake of the community at large, and of posterity.

If the law be as I have stated, it is not very extraordinary, that the court should, in a point not immediately before it, have adopted the *dicta* of writers in England as authority, and have applied them to this country, without full consideration of all the points on which the question turned.

I think, therefore, that it is proved, that under the constitution of the United States, no man can be convicted of treason, who was not present when the overt act, charged in the indictment, was committed.

NOTE.—The preceding is a small part only of Mr. Wickham's entire Speech.—COMPILER.

# SPEECH OF WILLIAM WIRT,

IN THE TRIAL OF

AARON BURR, FOR TREASON,

IN PREPARING THE MEANS OF A MILITARY EXPEDITION  
AGAINST MEXICO, A TERRITORY OF THE KING OF  
SPAIN, WITH WHOM THE UNITED STATES WERE AT  
PEACE;

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE  
DISTRICT OF VIRGINIA, 1807.



MAY IT PLEASE YOUR HONORS,

IT is my duty to proceed, on the part of the United States, in opposing this motion. But I should not deem it my duty to oppose it, if it were founded on correct principles. I stand here with the same independence of action, which belongs to the attorney of the United States; and as he would certainly relinquish the prosecution the moment he became convinced of its injustice, so also most certainly would I. The humanity and justice of this nation would revolt at the idea of a prosecution, pushed on against a life, which stood protected by the laws; but whether they would or not, I would not plant a thorn, to rankle for life in my heart, by opening my lips in support of a prosecution which I felt and believed to be unjust. But believing, as I do, that this motion is not founded in justice, that it is a mere manœuvre to obstruct the inquiry, to turn it from the proper course, to wrest the trial of the facts from the proper tribunal, the jury, and embarrass the court with a responsibility which it ought not to feel, I hold it my duty to proceed—for the sake of the court, for the sake of vindicating the trial by jury, now sought to be violated, for the sake of full

and ample justice in this particular case, for the sake of the future peace, union and independence of these states, I feel it my bounden duty to proceed. In doing which, I beg that the prisoner and his counsel will recollect the extreme difficulty of clothing my argument in terms which may be congenial with their feelings. The gentlemen appear to me to feel a very extraordinary and unreasonable degree of sensibility on this occasion. They seem to forget the nature of the charge, and that we are the prosecutors. We do not stand here to pronounce a panegyric on the prisoner, but to urge on him the crime of treason against his country. When we speak of treason, we must call it treason. When we speak of a traitor, we must call him a traitor. When we speak of a plot to dismember the union, to undermine the liberties of a great portion of the people of this country and subject them to a usurper and a despot, we are obliged to use the terms which convey those ideas. Why then are gentlemen so sensitive? Why on these occasions, so necessary, so unavoidable, do they shrink back with so much agony of nerve, as if, instead of a hall of justice, we were in a drawing-room with colonel Burr, and were barbarously violating towards him every principle of decorum and humanity?

Mr. Wickham has, indeed, invited us to consider the subject abstractedly; and we have been told, that it is expected to be so considered; but, sir, if this were practicable, would there be no danger in it? Would there be no danger, while we were mooted points, pursuing ingenious hypotheses, chasing elementary principles over the wide extended plains and Alpine heights of abstracted law, that we should lose sight of the great question before the court? This may suit the purposes of the counsel for the prisoner; but it does not, therefore, necessarily suit the purposes of truth and justice. It will be proper, when we have derived a principle from law or argument, that we should bring it to the case before the court, in order to



test its application and its practical truth. In doing which, we are driven into the nature of the case, and must speak of it as we find it. But besides, the gentlemen have themselves rendered this totally abstracted argument completely impossible; for one of their positions is, that there is no overt act proven at all. Now, that an overt act consists of fact and intention has been so often repeated here, that it has a fair title to justice Vaughan's epithet of a "*decantatum*." In speaking then of this overt act, we are compelled to inquire, not merely into the fact of the assemblage, but the intention of it; in doing which, we must examine and develope the whole project of the prisoner. It is obvious, therefore, that an abstract examination of this point cannot be made; and since the gentlemen drive us into the examination, they cannot complain, if without any softening of lights or deepening of shades, we exhibit the picture in its true and natural state.

This motion is a bold and original stroke in the noble science of defence. It marks the genius and hand of a master. For it gives to the prisoner every possible advantage, while it gives him the full benefit of his legal defence—the sole defence which he would be able to make to the jury, if the evidence were all introduced before them. It cuts off from the prosecution all that evidence which goes to connect the prisoner with the assemblage on the island, to explain the destination and objects of the assemblage, and to stamp beyond controversy the character of treason upon it. Connect this motion with that which was made the other day, to compel us to begin with the proof of the overt act, in which from their zeal gentlemen were equally sanguine, and observe what would have been the effect of success in both motions. We should have been reduced to the single fact, the individual fact, of the assemblage on the island, without any of the evidence which explains the intention and object of that assemblage. Thus gentlemen would

have cut off all the evidence, which carries up the plot almost to its conception, which at all events describes the first motion which quickened it into life and follows its progress until it attained such strength and maturity as to throw the whole western country into consternation. Thus, of the world of evidence which we have, we should have been reduced to the speck, the atom which relates to Blannerhassett's island. General Eaton's deposition (hitherto so much and so justly revered as to its subject,) standing by itself would have been without the powerful fortification derived from the corroborative evidence of commodore Truxtun, and the still stronger and most extraordinary coincidence of the Morgans. Standing alone, gentlemen would have still proceeded to speak of that affidavit, as they have heretofore done; not declaring that what general Eaton had sworn, was not the truth, but that it was a most marvellous story! a most wonderful tale! and thus would they have continued to seek, in the bold and wild extravagance of the project itself, an argument against its existence and a refuge from public indignation. But that refuge is taken away. General Eaton's narration stands confirmed beyond the possibility of rational doubt. But I ask what inference is to be drawn from these repeated attempts to stifle the prosecution and smother the evidence? If the views of the prisoner were, as they have been so often represented by one of his counsel, highly honorable to himself and glorious to his country, why not permit the evidence to disclose these views? Accused as he is of high treason he would certainly stand acquitted, not only in reason and justice, but by the maxims of the most squeamish modesty, in showing us by evidence all this honor and this glory which his scheme contained. No, sir, it is not squeamish modesty; it is no fastidious delicacy that prompts these repeated efforts to keep back the evidence; it is apprehension; it is alarm; it is fear; or rather it is the certainty that the evidence, whenever it shall come forward, will fix the charge; and if such



shall appear to the court to be the motive of this motion, your Honors, I well know, will not be disposed to sacrifice public justice, committed to your charge, by aiding this stratagem to elude the sentence of the law; you will yield to the motion no further than the rigor of legal rules shall imperiously constrain you.

I shall proceed now to examine the merits of the motion itself, and to answer the argument of the gentleman, (Mr. Wickham,) who opened it. I will treat that gentleman with candor. If I misrepresent him, it will not be intentionally. I will not follow the example, which he has set me, on a very recent occasion. I will not complain of flowers and graces, where none exist. I will not, like him, in reply to an argument as naked as a sleeping Venus, but certainly not half so beautiful, complain of the painful necessity I am under, in the weakness and decrepitude of logical vigor, of lifting first this flounce, and then that furbelow, before I can reach the wished for point of attack. I keep no flounces or furbelows ready manufactured and hung up for use in the millenary of my fancy, and if I did, I think I should not be so indiscreetly impatient to get rid of my wares, as to put them off on improper occasions. I cannot promise to interest you by any classical and elegant allusions to the pure pages of Tristram Shandy. I cannot give you a squib or a rocket in every period. For my own part, I have always thought these flashes of wit, (if they deserve that name,) I have always thought these meteors of the brain, which spring up, with such exuberant abundance, in the speeches of that gentleman, which play on each side of the path of reason, or sporting across it, with fantastic motion, decoy the mind from the true point in debate, no better evidence of the soundness of the argument, with which they are connected, nor, give me leave to add, the vigor of the brain from which they spring, than those vapors, which start from our marshes and blaze with a momentary combustion, and which, floating on the undulations of the atmos-



phere, beguile the traveller into bogs and brambles, are evidences of the firmness and solidity of the earth from which they proceed. I will endeavor to meet the gentleman's propositions in their full force, and to answer them fairly. I will not, as I am advancing towards them with my mind's eye, measure the height, breadth and power of the proposition; if I find it beyond my strength, halve it; if still beyond my strength, quarter it; if still necessary, subdivide it into eighths; and when, by this process, I have reduced it to the proper standard, take one of these sections and toss it, with an air of elephantine strength and superiority. If I find myself capable of conducting, by a fair course of reasoning, any one of his propositions to an absurd conclusion, I will not begin by stating that absurd conclusion, as the proposition itself, which I am going to encounter. I will not, in commenting on the gentleman's authorities, thank the gentleman, with sarcastic politeness, for introducing them, declare that they conclude directly against him, read just so much of the authority as serves the purpose of that declaration, omitting that which contains the true point of the case, which makes against me; nor, if forced by a direct call to read that part also, will I content myself by running over it as rapidly and inarticulately as I can, throw down the book, with a theatrical air, and exclaim, "just as I said," when I know it is just as I had not said. I know, that, by adopting these arts, I might raise a laugh at the gentleman's expense; but I should be very little pleased with myself, if I were capable of enjoying a laugh procured by such means. I know, too, that by adopting such arts, there will always be those standing around us, who have not comprehended the whole merits of the legal discussion, with whom I might shake the character of the gentleman's science and judgment as a lawyer. I hope I shall never be capable of such a wish, and I had hoped that the gentleman himself felt so strongly that proud, that high, aspiring and ennobling magnanimity, which I had been told conscious talents rarely fail to inspire.

that he would have disdained a poor and fleeting triumph, gained by means like these.

I proceed now to answer the several points of his argument, so far as they could be collected from the general course of his speech. I say, so far as they could be collected; for the gentleman, although requested, before he began, refused to reduce his motion to writing. It suited better his partisan style of warfare to be perfectly at large; to change his ground as often as he pleased; on the plains of Monmouth to-day, at the Eutaw Springs to-morrow. He will not censure me, therefore, if I have not been correct in gathering his points from a desultory discourse of four or five hour's length, as it would not have been wonderful if I had misunderstood him. I trust, therefore, that I have been correct; it was my intention to be so; for I can neither see pleasure nor interest, in misrepresenting any gentleman; and I now beg the court, and the gentleman, if he will vouchsafe it, to set me right if I have misconceived him.

I understood him, then, sir, to resist the introduction of further evidence, under this indictment, by making four propositions.

First. Because Aaron Burr, not being on the island, at the time of the assemblage, cannot be a principal in the treason, according to the constitutional definition or the laws of England.

Second. Because the indictment must be proved as laid; and as the indictment charges the prisoner with levying war, with an assemblage, on the island, no evidence to charge him with that act, by relation, is relevant to this indictment.

Third. Because, if he be a principal in the treason at all, he is a principal in the second degree; and his guilt being of that kind which is termed derivative, no parol evidence can be let in to charge him, until we shall show a record of the conviction of the principals in the first degree.

Fourth. Because no evidence is relevant to connect the prisoner with others and thus to make him a

traitor by relation, until we shall previously show an act of treason in these others; and the assemblage on the island was not an act of treason.

I beg leave to take up these propositions in succession, and to give them those answers which to my mind are satisfactory. Let us examine the first: it is because Aaron Burr, not being present on the island at the time of the assemblage, cannot be a principal in the treason, within the constitutional definition or the laws of England.

In many of the gentleman's general propositions, I perfectly accord with him: as that the constitution was intended to guard against the calamities to which Montesquieu refers, when he speaks of the victims of treason; that the constitution intended to guard against arbitrary and constructive treasons; that the principles of sound reason and liberty require their exclusion; and that the constitution is to be interpreted by the rules of reason and moral right. I fear, however, that I shall find it difficult to accommodate both the gentlemen who have spoken in support of the motion and to reconcile some of the positions of Mr. Randolph to the rules of Mr. Wickham; for while the one tells us to interpret the constitution by sound reason, the other exclaims, "save us from the deductions of common sense." What rule then shall I adopt? A kind of reason which is not common sense, might indeed, please both the gentlemen; but as that is a species of reason of which I have no very distinct conception, I hope the gentlemen will excuse me for not employing it. Let us return to Mr. Wickham.

Having read to us the constitutional definition of treason, and given us the rule by which it was to be interpreted, it was natural to expect, that he would have proceeded directly to apply that rule to the definition and give us the result. But while we were expecting this, even while we have our eyes on the gentleman, he vanishes like a spirit from American ground, and we see him no more until we see him in England,



resurging by a kind of intellectual magic in the middle of the sixteenth century, complaining most dolefully of my lord Coke's bowels. Before we follow him in this excursion, it may be well to inquire, what it was that induced him to leave the regular track of his argument. I will tell you what it was. It was, sir, the decision of the supreme court, in the case of Bollman and Swartwout. It was the judicial exposition of the constitution by the highest court in the nation, upon the very point which the gentleman was considering, which made him take this flight to England; because it stared him in the face and contradicted his position. Sir, if the gentleman had believed this decision to be favorable to him, we should have heard of it in the beginning of his argument, for the path of inquiry, in which he was, led him directly to it. Interpreting the American constitution, he would have preferred no authority to that of the supreme court of the country. Yes, sir, he would have immediately seized this decision with avidity. He would have set it before you in every possible light. He would have illustrated it. He would have adorned it. You would have seen it under the action of his genius appear with all the varying grandeur of our mountains in the morning sun. He would not have relinquished it for the common law, nor have deserted a rock so broad and solid, to walk upon the waves of the Atlantic. But he knew that this decision closed against him completely the very point which he was laboring. Hence it was, that the decision was kept so sedulously out of view, until from the exploded materials of the common law, he thought he had reared a Gothic edifice so huge and so dark, as quite to overshadow and eclipse it. Let us bring it from this obscurity into the face of day. We who are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself, and least of all from a source so high and so respectable as the decision of the supreme court of the United States. The inquiry is, whether presence at the overt

act be necessary to make a man a traitor? The gentlemen say, that it is necessary; that he cannot be a principal in the treason, without actual presence. What says the supreme court, in the case of Bollman and Swartwout? "It is not the intention of the court to say, that no individual can be guilty of this crime, who has not appeared in arms against his country; on the contrary, if war be actually levied, that is, if a body of men be assembled, for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

Here then we find the court so far from requiring presence, that it expressly declares, that however remote the accused may have been from the scene of the treasonable assemblage, he is still involved in the guilt of that assemblage; his being leagued in the general conspiracy was sufficient to make the act his own. The supreme court being of that opinion, proceeded to an elaborate examination of the evidence to ascertain whether there had been a treasonable assemblage. It looked to the depositions of general Eaton and general Wilkinson, the ciphered letter, the declaration of Swartwout that Burr was levying an armed body of seven thousand men; and it looked to these parts of the evidence expressly for the purpose of discovering, whether it were probable that Burr had actually brought these men together; not whether Bollman and Swartwout were present at any such assemblage. It knew that if any such assemblage had taken place, Bollman and Swartwout must have been at that time at the city of Orleans or on their way thither; indeed the whole reasoning of the court proceeded on the fact, as admitted, of the prisoner's absence. Why then the laborious investigation which the court makes as to the probability of Burr having brought his men or any part of them together, unless the guilt of that assemblage were to be imputed to



Bollman and Swartwout? If their absence were sufficient to excuse them, that fact was admitted, and the inquiry would have been a very short one. But the court having previously decided, that the fact of presence or absence was unimportant; that it made no odds how far distant the accused might be from the treasonable assemblage; it became the unavoidable duty of the court, to proceed to the inquiry, whether any such assemblage had taken place; and if the evidence had manifested that fact to its satisfaction, it is clear, that in the opinion of that court, the prisoners would have been as deeply involved in the guilt of that assemblage, as any of those who actually composed it.

The counsel knew, that their first point was met directly by the counter authority of the supreme court. They have impliedly, if not expressly, admitted it; hence they have been reduced to the necessity of taking the bold and difficult ground, that the passage which I have read is extrajudicial, a mere *obiter dictum*. They have said this, but they have not attempted to show it.

Give me leave to show, that they are mistaken; that it is not an *obiter dictum*; that it is not extrajudicial; but that it is a direct adjudication of a point immediately before the court. What were the questions before the court? The court made no formal division of this subject, but these questions are necessarily and irresistibly involved in it. It must first be observed, that the arrest of Bollman and Swartwout, at New Orleans, and the fact that they had not been present at any assemblage of the traitors in arms, were notorious and admitted. The case, then, presented to the court three distinct questions. First. Has Aaron Burr committed treason, or has he been engaged or leagued in any treasonable conspiracy? Second. Were Bollman and Swartwout connected with him? Third. Could they be guilty of treason, without being actually present? Now, if the court had been satisfied, that there had been an overt act, and that these men were



leagued in the conspiracy which produced it, still it would have remained a distinct and substantive question, whether their absence from the overt act, and their having no immediate hand in it, did not discharge them from the constitutional guilt of levying war; for, though leagued in the conspiracy, and although there might have been an overt act, these men would have been innocent, if presence at the overt act were necessary to make them guilty. The question, then, of presence or absence, was a question really presented by the case of Bollman and Swartwout. It was one important to the decision of the case, and the court, thinking it so, did consider and decide it, in direct opposition to the principle contended for on the other side. A plain man would imagine, that when the supreme court had taken up and decided the case, its decision would form a precedent on the subject, and having that authority on my side, I should suppose, that I might safely dismiss the gentleman's first point. But Mr. Randolph seems to think it very doubtful, whether you ought to be bound by that authority, and that you must be very much embarrassed to have to decide it, even admitting it to be a regular judicial determination of this question; for he made a very pathetic and affecting apostrophe to the situation in which you would be placed, if you differed from this opinion of the supreme court.

I see no difficulty in the case, if our laws are to be uniform. How can the inferior court control the decisions of the superior court? You are but a branch of the supreme court. If you, sir, sitting as a circuit court, have a right to disregard the rule decided by the supreme court, and adopt a different rule, every other inferior court has an equal right to do the same; so that there will be as many various rules as to treason as there are courts; and the result might be and certainly would be, that what would be treason in one circuit would not be treason in another; and a man might be hung in Pennsylvania, for an act against the United States, in which he would be held perfectly in-

nocent in Virginia. Thus treason against the United States would still be unsettled and fluctuating, and the object of the constitution, in defining it, would be disappointed and defeated; whereas a principle of law, solemnly adjudged by the supreme court, becomes, I apprehend, the law of the land; and all the inferior courts are compulsorily bound by it. To say that they are not, is to disorganize the whole judiciary system, to confound the distinctions and grades of the courts, to banish all certainty and stability from the law, and to destroy all uniformity of decision. I trust that we are not prepared to rush into this wild disorder and confusion, but that we shall temperately and regularly conform to the decrees of that parent court, of which this is a mere branch, until those decrees shall be changed by the same high authority which created them.

But, for a moment, let us relinquish that decision, and, putting it aside, let us indulge the gentleman with the inquiry, whether that decision be in conformity with the constitution of the United States, and the laws of England. In interpreting the constitution, let us apply to it the gentleman's own principles: the rules of reason and moral right. The question to be thus determined is, whether a man, who is absent, may not be guilty as if he were actually present.

That a law should be so construed as to advance the remedy and repress the mischief, is not more a rule of common law, than a principle of reason; it applies to penal as well as to remedial laws. So also the maxim of the common law, that a law as well as a covenant should be so construed that its object may rather prevail than perish, is one of the plainest dictates of common sense. Apply these principles to the constitution. Gentlemen have said, that its object was to prevent the people from being harassed by arbitrary and constructive treason. But its object, I presume, was not to declare that there was no such crime. It certainly did not mean to encourage treason. It meant to recognize the existence of the crime and provide for



its punishment. The liberties of the people, which required that the offence should be defined, circumscribed and limited, required also that it should be certainly and adequately punished. The framers of the constitution, informed by the examples of Greece and Rome, and foreseeing that the liberties of this republic might one day or other be seized by the daring ambition of some domestic usurper, have given peculiar importance and solemnity to the crime, by ingrafting it upon the constitution. But they have done this in vain, if the construction, contended for on the other side, is to prevail. If it require actual presence at the scene of the assemblage to involve a man in the guilt of treason, how easy will it be for the principal traitor to avoid this guilt and escape punishment forever! He may go into distant states, from one state to another. He may secretly wander, like a demon of darkness, from one end of the continent to the other.

He may enter into the confidence of the simple and unsuspecting. He may pour his poison into the minds of those who were before innocent. He may seduce them into a love of his person, offer them advantages, pretend that his measures are honorable and beneficial, connect them in his plot and attach them to his glory. He may prepare the whole mechanism of the stupendous and destructive engine and put it in motion. Let the rest be done by his agents. He may then go a hundred miles from the scene of action. Let him keep himself only from the scene of the assemblage and the immediate spot of battle, and he is innocent in law, while those whom he has deluded are to suffer the death of traitors! Who is the most guilty of this treason, the poor, weak, deluded instruments, or the artful and ambitious man who corrupted and misled them? There is no comparison between his guilt and theirs; and yet you secure impunity to him, while they are to suffer death! Is this according to the rules of reason? Is this moral right? Is this a mean of preventing treason? Or rather, is it not in truth a direct invitation to it? Sir. it is obvious, that neither rea-



son nor moral rights require actual presence at the overt act to constitute the crime of treason. Put this case to any common man, whether the absence of a corruptor should exempt him from punishment for the crime, which he has excited his deluded agents to commit; and he will instantly tell you, that he deserves infinitely more severe punishment than his misguided instruments. There is a moral sense, much more unerring in questions of this sort, than the frigid deductions of jurists or philosophers; and no man of a sound mind and heart, can doubt for a moment between the comparative guilt of Aaron Burr, (the prime mover of the whole mischief,) and the poor men on Blannerhassett's island, who called themselves Burr's men. In the case of murder, who is the most guilty, the ignorant, deluded perpetrator, or the abominable instigator? The decision of the supreme court, sir, is so far from being impracticable on the ground of reason and moral right, that it is supported by their most obvious and palpable dictates. Give to the constitution the construction contended for on the other side, and you might as well expunge the crime from your criminal code; nay, you had better do it, for by this construction you hold out the lure of impunity to the most dangerous men in the community, men of ambition and talents, while you loose the vengeance of the law on the comparatively innocent. If treason ought to be repressed, I ask you, who is the most dangerous and the most likely to commit it—the mere instrument who applies the force, or the daring, aspiring, elevated genius who devises the whole plot, but acts behind the scenes?\*

I come now, sir, to the gentleman's third point, in which he says he cannot possibly fail. It is this: "because, if the prisoner be a principal in the treason at all, he is a principal in the second degree; and his guilt being of that kind which is termed derivative, no

\* The remainder of Mr. Wirt's argument upon this point, and his entire argument on the second point are omitted.—COMPILER.

further parol evidence can be let in to charge him, until we show a record of the conviction of the principals, in the first degree."

By this, I understand the gentleman to advance, in other terms, the common law doctrine, that when a man is rendered a principal in treason, by acts which would make him an accessory in felony, he cannot be tried before the principal in the first degree.

I understand this to be the doctrine of the common law, as established by all the authorities; but when I concede this point, I insist, that it can have no effect in favor of the accused, for two reasons: first, because it is the mere creature of the common law; second, because, if the common law of England be our law, this position assumes what is denied, that the conduct of the prisoner, in this case, is of an accessorial nature, or such as would make him an accessory in felony.

First. Because this position is the mere creature of the common law. If it be so, no consequence can be deduced from it. It is sufficient, on this branch of the subject, to take his own declaration, that the common law does not exist in this country. If we examine the constitution and the act of Congress, we shall find, that this idea of a distinction between principals in the first and second degree, depends entirely on the common law. Neither the constitution nor the act of Congress knows any such distinction. All who levy war against the United States, whether present or absent—all who are leagued in the conspiracy, whether on the spot of the assemblage or performing some minute and inconsiderable part in it, a thousand miles from the scene of action, incur equally the sentence of the law; they are all equally traitors. This scale, therefore, which graduates the guilt of the offenders and establishes the order of their respective trials, if it ever existed here, is completely abrogated by the highest authorities in this country. The convention, which formed the constitution and defined treason, Congress which legislated on that subject, and the su-



preme judiciary of the country expounding the constitution and the law, have united in its abrogation. But let us, for a moment, put the convention, Congress and judiciary aside, and examine how the case will stand. Still this scale of moral guilt, which Mr. Wickham has given us, is the creature of the common law, which, as already observed, he himself, in another branch of his argument, has emphatically told us does not exist in this country. He has stated that the creature presupposes the creator, and that where the creator does not exist, the creature cannot. The common law, then, being the creator of the rule which Mr. Wickham has given us, and that common law not existing in this country, neither can the rule, which is the mere creature of it, exist in this country. So that the gentleman has himself furnished the argument, which refutes this infallible point of his, on which he has so much relied. But to try this position to its utmost extent, let us not only put aside the constitution, and act of Congress, and decision of the supreme court, but let us admit that the common law does exist here. Still, before the principle could apply, it would remain to be proven, that the conduct of the prisoner, in this case, has been accessorial; or, in other words, that his acts, in relation to this treason, are of such a nature as would make him an accessory in felony.

But is this the case? It is a mere *petitio principii*. It is denied that his acts are such as would make him an accessory in felony. I have already, in another branch of this subject, endeavored to show, on the grounds of authority and reason, that a man might be involved in the guilt of treason as a principal by being legally though not actually present; that treason occupied a much wider space than felony; that the scale of proximity between the accessory and principal must be extended in proportion to the extent of the theatre of the treason; and that as the prisoner must be considered as legally present, he could not be an accessory but a principal. If I have succeeded in this, I have in fact proved that his conduct cannot be deem-



ed accessorial. But an error has taken place from considering the scene of the overt act as the theatre of the treason, from mistaking the overt act of the treason itself, and consequently from referring the conduct of the prisoner to the acts on the island. The conduct of Aaron Burr has been considered in relation to the overt act on Blannerhassett's island only ; whereas it ought to be considered in connexion with the grand design, the deep plot of seizing Orleans, separating the union and establishing an independent empire in the west, of which the prisoner was to be the chief. It ought to be recollected that these were his objects, and that the whole western country, from Beaver to Orleans was the theatre of his treasonable operations. It is by this first reasoning that you are to consider whether he be a principal or an accessory, and not by limiting your inquiries to the circumscribed and narrow spot in the island where the acts charged happened to be performed. Having shown, I think, on the ground of law, that the prisoner cannot be considered as an accessory, let me press the inquiry, whether on the ground of reason he be a principal or an accessory ; and remember that his project was to seize New Orleans, separate the union and erect an independent empire in the west of which he was to be the chief. This was the destination of the plot and the conclusion of the drama. Will any man say that Blannerhassett was the principal, and Burr but an accessory ? Who will believe that Burr, the author and projector of the plot, who raised the forces, who enlisted the men and who procured the funds for carrying it into execution, was made a cat's paw of ? Will any man believe that Burr, who is a soldier, bold, ardent, restless and aspiring, the great actor whose brain conceived, and whose hand brought the plot into operation, that he should sink down into an accessory, and that Blannerhassett should be elevated into a principal ? He would startle at once at the thought. Aaron Burr, the contriver of the whole conspiracy, to every body concerned in it was as the sun to the planets which surround him. Did he

not bind them in their respective orbits and give them their light, their heat and their motion? Yet he is to be considered an accessory, and Blannerhassett is to be the principal!

Let us put the case between Burr and Blannerhassett. Let us compare the two men and settle this question of precedence between them. It may save a good deal of troublesome ceremony hereafter.

Who Aaron Burr is, we have seen in part already. I will add, that beginning his operations in New York, he associates with him men whose wealth is to supply the necessary funds. Possessed of the main spring, his personal labor contrives all the machinery. Pervading the continent from New York to New Orleans, he draws into his plan, by every allurements which he can contrive, men of all ranks and descriptions. To youthful ardor he presents danger and glory; to ambition, rank and titles and honors; to avarice the mines of Mexico. To each person whom he addresses he presents the object adapted to his taste. His recruiting officers are appointed. Men are engaged throughout the continent. Civil life is indeed quiet upon its surface, but in its bosom this man has contrived to deposit the materials which, with the slightest touch of his match, produce an explosion to shake the continent. All this his restless ambition has contrived; and in the autumn of 1806, he goes forth for the last time to apply this match. On this occasion he meets with Blannerhassett.

Who is Blannerhassett? A native of Ireland, a man of letters, who fled from the storms of his own country to find quiet in ours. His history shows that war is not the natural element of his mind. If it had been, he never would have exchanged Ireland for America. So far is an army from furnishing the society natural and proper to Mr. Blannerhassett's character, that on his arrival in America, he retired even from the population of the Atlantic States, and sought quiet and solitude in the bosom of our western forests. But he carried with him taste and science and wealth; and lo, the



desert smiled! Possessing himself of a beautiful island, in the Ohio, he rears upon it a palace, and decorates it with every romantic embellishment of fancy. A shrubbery, that Shenstone might have envied, blooms around him. Music, that might have charmed Calypso and her nymphs, is his. An extensive library spreads its treasures before him. A philosophical apparatus offers to him all the secrets and mysteries of nature. Peace, tranquillity and innocence shed their mingled delights around him. And to crown the enchantment of the scene, a wife, who is said to be lovely even beyond her sex, and graced with every accomplishment that can render it irresistible, had blessed him with her love and made him the father of several children. The evidence would convince you, that this is but a faint picture of the real life. In the midst of all this peace, this innocent simplicity and this tranquillity, this feast of the mind, this pure banquet of the heart, the destroyer comes; he comes to change this paradise into a hell. Yet the flowers do not wither at his approach. No monitory shuddering through the bosom of their unfortunate possessor warns him of the ruin that is coming upon him. A stranger presents himself. Introduced to their civilities, by the high rank which he had lately held in his country, he soon finds his way to their hearts by the dignity and elegance of his demeanor, the light and beauty of his conversation, and the seductive and fascinating power of his address. The conquest was not difficult. Innocence is ever simple and credulous. Conscious of no design itself, it suspects none in others. It wears no guard before its breast. Every door and portal and avenue of the heart is thrown open, and all who choose it enter. Such was the state of Eden, when the serpent entered its bowers. The prisoner, in a more engaging form, winding himself into the open and unpractised heart of the unfortunate Blannerhassett, found but little difficulty in changing the native character of that heart and the objects of its affection. By degrees, he infuses into it



the poison of his own ambition. He breathes into it the fire of his own courage; a daring and desperate thirst for glory; an ardor panting for great enterprises, for all the storm and bustle and hurricane of life. In a short time the whole man is changed, and every object of his former delight is relinquished. No more he enjoys the tranquil scene; it has become flat and insipid to his taste. His books are abandoned. His retort and crucible are thrown aside. His shrubbery blooms and breathes its fragrance upon the air in vain; he likes it not. His ear no longer drinks the rich melody of music; it longs for the trumpet's clangor and the cannon's roar. Even the prattle of his babes, once so sweet, no longer affects him; and the angel smile of his wife, which hitherto touched his bosom with ecstasy so unspeakable, is now unseen and unfelt. Greater objects have taken possession of his soul. His imagination has been dazzled by visions of diadems, of stars and garters and titles of nobility. He has been taught to burn with restless emulation at the names of great heroes and conquerors. His enchanted island is destined soon to relapse into a wilderness; and in a few months we find the beautiful and tender partner of his bosom, whom he lately 'permitted not the winds of' summer 'to visit too roughly,' we find her shivering at midnight, on the winter banks of the Ohio and mingling her tears with the torrents, that froze as they fell. Yet this unfortunate man, thus deluded from his interest and his happiness, thus seduced from the paths of innocence and peace, thus confounded in the toils that were deliberately spread for him, and overwhelmed by the mastering spirit and genius of another—this man, thus ruined and undone, and made to play a subordinate part in this grand drama of guilt and treason, this man is to be called the principal offender, while he, by whom he was thus plunged in misery, is comparatively innocent, a mere accessory! Is this reason? Is it law? Is it humanity? Sir, neither the human heart nor the human understanding will bear a

perversion so monstrous and absurd! so shocking to the soul! so revolting to reason! Let Aaron Burr, then, not shrink from the high destination which he has courted, and having already ruined Blannerhassett in fortune, character and happiness, forever, let him not attempt to finish the tragedy by thrusting that ill-fated man between himself and punishment.

Upon the whole, sir, reason declares Aaron Burr the principal in this crime, and confirms herein the sentence of the law; and the gentleman, in saying that his offence is of a derivative and accessorial nature, begs the question and draws his conclusions from what, instead of being conceded, is denied. It is clear from what has been said, that Burr did not derive his guilt from the men on the island, but imparted his own guilt to them; that he is not an accessory, but a principal; and therefore, that there is nothing in the objection which demands a record of their conviction before we shall go on with our proof against him.

But suppose you should think otherwise, suppose you were of opinion, that on principles of law and reason, (notwithstanding the seeming injustice and inhumanity of considering him as inferior in guilt to them,) Aaron Burr was not a principal, but an accessorial offender in the treason, would you, for that reason, stop the evidence from going to the jury? Now, to inquire whether the conduct of Aaron Burr make him liable as a principal or accessory, is only arguing in a different shape the whole question, whether he have committed an overt act of war or not. The jury are to consult and decide whether he be a principal offender or not. Whether he be a principal or accessory is a question of fact, which they are sworn to decide. The court must judge of the weight of evidence, before it can say that the accused is either a principal or accessory. Suppose one part of the evidence contradicts another. Is it not judging of the weight of evidence to decide whether he be a principal or accessory? If it be not, I know not what judg-



ing of the weight of evidence is. Nothing is more peculiarly within the exclusive province of the jury than the sufficiency or insufficiency of the evidence.

But the court never says, that the evidence is or is not sufficient to prove what it is intended to establish. No court has such right. The course in such cases, is to give instructions in a general charge to the jury, after all the evidence shall have been heard. Will you, because of your impressions on this subject, from a merely partial view of the evidence, compel the jury also to decide on that necessarily partial view? If you do, do you not thereby divest the jury of their peculiar functions? Their province should not be invaded. The invasion is big with danger and terror. I trust that you will see this subject in the awful light in which it really stands, and that you will suffer the trial to take its natural course.

Mr. Martin has referred you to a number of cases from Cooper and other authors, but they do not prove the position intended. The court, in all these cases, leaves the jury to decide on the overt act. You will find those cases to amount simply to this: a dialogue between the court and the counsel of the prisoner, as to the overt act. The court was required to say, whether the overt act were proved or not. There was no judicial determination. The judge merely told his opinion, but he told the jury, at the same time, that the decision belonged to them and not to him.

There is a wide difference between criminal and civil cases; and as it is of much more importance to preserve the trial by jury in the former, to protect the lives of the people against unjust persecutions, than in mere civil suits, to preserve the rights of property, the constitution has secured that trial in all criminal prosecutions.

Should the court interfere, for the purpose of stopping the evidence, and to wrest the cause from the jury, in favor of the accused, would there not be a reciprocal right? If it can interfere to save the prisoner, can they not interfere equally against him? A



thing unprecedented in the annals of jurisprudence. Have the counsel, on either side, a right to call on the other side, to state all their evidence, before it be introduced, and then to address the court without hearing it, if they think they have a better chance before the court than the jury? Has either party a right to substitute the court for the jury, or the jury for the court, at pleasure; to address the court on facts, or the jury on points of law? Such an attempt would not be a greater encroachment on the right of the proper tribunal, than the present motion is on the rights of the jury.

NOTE.—The remainder of Mr. Wirt's speech, in which he replied to Mr. Wickham's fourth objection to the admission of further evidence on the part of the prosecution, is omitted.—COMPILER.

# SPEECH OF EDMUND RANDOLPH,

IN THE TRIAL OF

AARON BURR, FOR TREASON,

IN PREPARING THE MEANS OF A MILITARY EXPEDITION  
AGAINST MEXICO, A TERRITORY OF THE KING OF  
SPAIN, WITH WHOM THE UNITED STATES WERE AT  
PEACE;

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE  
DISTRICT OF VIRGINIA, 1807.



THE little fragment of time, that is left for me, may it please your Honors, I shall not abuse. The day before yesterday I informed the court, that I had reserved to myself the right of fully answering the arguments of gentlemen on the other side; but I forbore to exercise it in consideration of my respect for Mr. Martin. But I said, that if any thing should be omitted by him, I would take the liberty of addressing the court, to supply the omission. There is scarcely any thing which Mr. Martin has not noticed. He has amused and instructed us; but it is difficult to come within that condition I had prescribed to myself; and there are two or three sentiments which I have much at heart, and on which I could not justify to myself to remain silent.

I do not mean to pass through the long series of authorities, to which reference has been had; because not a single case has been adduced, by the gentlemen for the prosecution, that has not been fully answered, and its intended effects repelled. I shall endeavor to connect the observations I am about to make, with the general subject already submitted to you; but though this cannot be done without mentioning principles

which have been sufficiently discussed, I shall avoid repetition as much as possible, and endeavor to place the subject in such a clear point of view, that our object cannot be misunderstood.

We have been charged with attempting to exclude further testimony, and thereby encroaching on the sacred rights of the jury. Courts have their rights; and juries have theirs. They are capable of being reconciled; for they are bodies of the same system. But, although the court has no right to dictate the motion of the jury, it has a right to restrain them within their proper orbits. They are brethren in the administration of justice, not rivals in power; and if I were permitted to draw an analogy, I would say, that the court is the father of the judicial family; that both are essential to administer justice according to law. This the court is bound to enforce; and this the jury are bound to obey.

Why should they complain? Because, say gentlemen, we suppress testimony. How do we suppress testimony? They have a *carte blanche*, and are at liberty to suppose every other evidence, except what they know does not exist, that is, the presence of Mr. Burr, and that actual force was employed. They may, if they can, prove every thing short of these things. Have not gentlemen seized these with great eagerness? They have kept their eyes on the court, but alarmed the ears of the jury. They have professed to talk in the abstract, but have described with a pencil whose strokes, dark as Erebus, and intended similitude and application could not be mistaken. They have thrown, with rhetorical magic, into the cauldron of public opinion, already overboiling, poisonous ingredients, to the ruin of colonel Burr. We wage an unequal war: an individual against the whole power and influence of the United States. We have to defend ourselves but with law and fact. Only permit us, if you please, to come with this dreadful disparity, (for thus we have to contend,) even when clothed with the



mail of innocence. We ask for the benefit of the law. Why should we be upbraided for asking no more than the law has given us? That we must have. There is not a power on earth that can refuse us what the law gives. It is a privilege given for good reasons as a check to prevent the danger of perversion to oppression; of degeneracy to tyranny. We have fundamental fact to proceed upon: the absence of colonel Burr from the scene of action. His absence is acknowledged; and if it were not, it is proved by us. Hence emerges a question, whether any facts, which can be proved, can convict him as a principal in the treason, alleged to have been committed in his absence. If he were not present at Blannerhassett's island, as stated in this indictment, how can he be convicted as a principal? After the admission, that he was absent, how can they succeed? They cannot add one iota to what relates to this part of the business. It is a rule that cannot be controverted, that when an indispensable position cannot be proved, the court may interpose with respect to the law, and state its necessity to the jury. This is not a case of equivocal testimony, where credibility and mere weight are to be considered; which it would be improper for the court to decide upon. We ask your opinion of facts, concerning which there is no doubt. Why should the trial proceed, if it should be the opinion of the court, that proof of his absence cannot support the charge of his being present as an actor? Surely not to add fuel to the general inflammation, which has already spread far and wide, and that only for the mere purpose of gratifying any one man or set of men; for this court sits not for the amusement of the public fancy, or the gratification of public malignity.

But, say they, may not the jury decide the law and the fact against the opinion of the court? But is it proper to produce a struggle between the court and jury? Ought the jury to disregard the opinion of the court when it is confessedly correct? When the court

tells the jury truly, that the *substratum* does not exist, a respectable jury never did and never will find a verdict of guilty.

They say, that they are determined to probe this conspiracy, as it is called, to the bottom; and, therefore, they make these extraordinary efforts; but is there no respect that counsel ought to have for their character, to prevent them from pressing on the jury, doctrines which they know to be illegal? Is there no respect due from the jury to the admonition of the court? If irrelevant testimony be to be admitted, twenty or twenty-five days, or more, may be spent in hearing what has no relation to the subject, and cannot affect us. It is in vain, therefore, to proceed. What ought we to expect from the court? Its authority. If the law is to be regarded, we have a right to call on the court for the exercise of its authority to prevent the introduction of illegal testimony.

If, indeed, as Mr. Hay and Mr. Wirt said, the consequences of this interposition of the court would be the annihilation of the rights of the jury, I would answer, that any individual on earth ought to be sacrificed, rather than that so great a danger should be realized. I wish not to touch so inestimable an institution. But there exists no such danger. Why do we wish to have juries? It is, that men, of our own condition, and who have a fellow-feeling for us, should determine controversies and try accusations against individuals among us; so that no standing jurisdiction or permanent tribunal is to be employed to dictate the fate of any individual. It is a wise and humane regulation, that a jury should thus interpose between the public and an individual. For it is very improbable that oppression will ever take place on that side. All is safe while decisions are on the side of tenderness. No precedent can be drawn from all this to sanction injustice or oppression.

It is objected, that juries would thus be prostrated; and that the court might, on the same principle, decide against the accused. Who thus complains? Was it



ever argued, that the rights of the jury and the safety of the citizen were destroyed by a favorable opinion to the accused?

Let a Jeffreys arise and succeed you on that seat, let him arrogate to himself what powers he pleases, let him encroach on privileges and tyrannize over the rights of juries, and all those who shall advocate them, yet what examples would he take? If he would permit precedent to be quoted as authority before him, would he take the exercise of mercy for his example?

When this Jeffreys shall arise, he will not act on precedent, but will boldly bound over every barrier, if he wish to seize his victim; but if he were to follow precedent, he would never take one on the side of mercy. He would pursue an example of rigid severity and cruelty. Would judge Chase have been impeached if, in the case of Callender, he had decided on the side of mercy; if he had yielded to the high-wrought pretensions of Callender? Would he have been impeached for a misdirection, in issuing process, had he directed a summons to issue instead of a *capias*? Sir, it is a phenomenon in law and judicial proceedings, that the accused should suffer now, (as the counsel for the prosecution insist,) in order to provide security for persons who may be accused hereafter; that his rights must be taken from him, in order that others may not lose theirs!

Sir, I am not surprised that the people have been taught to believe that we mean to smother testimony. I have been told of it out of doors; and I have no doubt that such is the general opinion. This is the effect of the improper publicity given to whatever passes here. I have remonstrated against this malpractice, but in vain. We see that not a particle of intelligence is received, no step is taken, nothing happens here, which is not in twelve hours made public. This intelligence will be diffused, augmented and distorted. We make no attempts of this sort. These reports remain uncontradicted and excite prejudices against us. I wish to know, then, how it can be shown



that we have such an object in view. Where is the proof of smothering testimony? We deny the truth of the accusation. We wish not to suppress testimony; but it is our duty to oppose the admission of what is not lawful evidence, since so much prejudice has been excited against the accused.

Away then with this idea, that we wish to suppress testimony. We only claim what the law allows; and I am afraid that if he be deprived of this right, there never will be again found, in this country, a tribunal able to fortify itself against popular clamor, or counsel sufficiently firm to support an unfortunate client against popular fury. I want no precedents. I want nothing but pre-eminence of virtue and talents to discern and decide. And while you are placed on the seat of justice, we fear not to meet that high tone of popularity, that popular rage which is so much, and, we say, so unjustly inflamed against us; if not met now, it never can be met.

We are told that every man is a politician, and even judges may be so hereafter. Then we shall be in danger. When they become political partisans we shall be in danger. This evinces the greater necessity of adhering inflexibly to principle.

I do not wish to go beyond the seas for examples; but I cannot help reminding the court of the conduct of the illustrious Mansfield. He stood, on a critical occasion, as this court stood at the beginning of this trial. I am inclined to believe that the public prejudice has relented; but suppose it to be still in its full fury, the situations are similar. When the popular frenzy was at its utmost height he had to encounter it. He displayed that unshaken firmness which this court now feels. He was unmoved by popular clamor, unawed by popular fury. He wanted no popularity but that which he was sure would follow him and survive when he was no more; that which ever pursues meritorious conduct, the high meed of virtue, which is the best stimulus to the most honorable exertions.

If it were to be said that we want authority and precedent here for this firmness of conduct, we can say that our Washington is recorded in trials not wholly different. He was once in a situation where he might have been alarmed with what was called the popular voice. He was assailed by popular clamor and discontent; but he was firm to his purpose. I can only say that he would have been without a historian, if he had not withstood them.

An argument has been already used, which, if well understood, cannot be resisted. I feel it to be firmly established; but I hope the court will excuse me for indulging myself in further explaining the principle; not because I deem it necessary after what has been said, but because I want the jury, this audience and all the world to know and be impressed with what are the rights of the accused. It is this: that when a fact, essential to the guilt of the accused, does not exist, all further proceedings against him should cease.

[After examining this doctrine at considerable length, Mr. Randolph proceeded.]

Another circumstance has been offered to your consideration with a view of exciting the public indignation. Blannerhassett has been most piteously represented as a seduced person; and it is asked—what! shall the seducer be acquitted, and the seduced be the victim? And in order to make the representation more affecting, and to excite our sympathy to a higher degree, the gentleman has gravely introduced his lovely wife and prattling children, his hatred of war, his love of music, of literature and chemistry, till his seduction by the arts of Mr. Burr.

Sir, I believe that Blannerhassett is innocent. I know him to be innocent; and he may defy all the efforts to be made against him. But the situation in which he is placed, does not reflect criminality on colonel Burr. Do you examine into the character and conduct of the accessory in examining the principal—as whether he were under the influence of the

principal or not? Is not this an invitation to subvert all the rules of the law? Blannerhassett is not to be examined; but he is to be called small in guilt, because that of Mr. Burr is to be magnified. This is done not out of any cordiality to him, but in hatred of Burr. The question now, when he is tried as a principal, is, is he guilty or not? Did he commit the fact? Whereas, according to law, when an accessory before the fact is examined or tried, the only question is, did he abet or aid him who committed the act? and not whether he committed the act himself. This argument was not addressed to you, but to those who surround this great tribunal.

But the constitution, the law of England, and American decisions have been quoted to show that the prime mover is at any distance a principal. I will examine all these; but the constitution is what I have most at heart, and what I will first consider.

Mr. Hay says that he would rather the constitution should perish than the rights of juries. I revere both. I revere the constitution, because, among other blessings, it secures the rights of juries; and there is no man who hears me, but is convinced that the rights incident to the trial by jury are secured by it.

The constitution is not express upon this subject; and if it be not express, are you to narrow it? Are you to conjecture so as to create a new crime, not only in name but in substance, by introducing a new person which the constitution never contemplated by adding "procuring" as a crime to "doing?"

But we are told that the constitution has adopted terms in treason which are well known. Be it so. But it is only to tell you what is the "*læsa majestas*" of the nation. It tells you that the legislature should never avail themselves of the malignant passions of the people so as to call that "*læsa majestas*" which is not so in fact.

The constitution only intended the classification of crimes which should be considered, as tending directly to the subversion of the government. It was



left to the legislature to say what particular acts should have this tendency, and to provide the punishment. The constitution supposed that there could be only two classes of cases in which the government could be subverted: levying war, and adhering to the enemies of the country. It never could have been intended to import aid from the common law to expound the constitution. It is only a general description; and the legislature are left to provide a proper remedy for the evil. The legislature, therefore, might have declared at any time, what should be done with an accessory before the fact. They might punish this and other accessorial offences, by a law coming within the sweeping clause which empowers Congress to make all laws which shall be necessary and proper to carry their enumerated powers into effect.

But the constitution is to be considered according to reason and moral right; and both ask if a transcendent offender be to slip down into an accessory? The answer is, that if reason which judges of the fitness of things, moral right which gives more latitude, or even common sense, be permitted to add persons according to different men's ideas of propriety, what advantage is derived from the principle which has been so long cherished, that penal laws shall be construed strictly? What becomes of the doctrine? What benefit can be had from the constitution containing precise terms and an express enumeration of powers, if moral right, common sense and reason, according to the diversity of human opinions, are to be applied to infer and imply its meaning? We may apply these to Eutopia, Oceana, or even the visions of Plato, or rather the tribunal of Draco: for wherever they, or what is the same thing, men's different conceptions of them, are to determine what shall be right construction, there will be a tribunal of blood. Language must indeed be understood as the world understands it; but the ideas must not be extended beyond the natural import. I will ask a man of the most common understanding, who is not connected with the

cause of colonel Burr, whether a man, at the distance of three hundred miles from the scene of operation, can be the same as the actual perpetrator? Whether a man could be charged as present at the spot, and doing an act when he was at three hundred miles distance? What would be his answer? Would he not call it the grossest absurdity? Does not the very idea of law revolt at such a construction? The constitution does not impose it. The common law, the gentleman admits, does not impose it; but common sense requires it! So that common sense shall say absence is presence, and shall consider one man as another, and plunge a dagger into his breast against justice and reason! It is contrary to the common understanding of the world. It is impossible, in the nature of things, that a man at the distance of three hundred miles can be present. This transcends the wildest extravagance of fancy. By metaphysical legerdemain they annihilate space and consolidate identities!

The apprehensions which were entertained, and the dangers predicted but a short time past from construction seem to have been soon forgotten. If you begin so early with creating offences by mere analogy, as constructive presence, where will you stop? Trace the consequences of taking one man for another. Reflect how many shades and approaches there are to guilt. If you can confound these without distinction and charge a man, who commanded an act to be done by his agent, to have been present and to have done it himself; if you charge a crime directly contrary to facts, you mislead and surprise; you are arriving at a point which will involve doctrines of treason which were never intended by the framers of the constitution.

There is a passage in Hume's history which well applies to this subject. I do not say that it will be considered as an authority in a case of treason; but it merits our attention as suggesting useful reflections with respect to the progress of guilt and the prompti-

tude with which the agents of those in power will oppress and destroy to gratify their employers. The court will recollect the conduct of Henry II. towards Thomas Becket, archbishop of Canterbury, whom he had raised from a low station to the highest offices; but whom he cordially hated and persecuted a long time on account of his signal ingratitude, his haughtiness and rigid opposition to his power; which he considered to be treason.

After he had issued sentence of excommunication against some of the king's best friends, when the king was informed of it, being vehemently agitated, he burst into an exclamation against his servants, "whose want of zeal," he said, "had so long left him exposed to the enterprises of that ungrateful and imperious prelate." Four gentlemen of his household, taking these passionate expressions for a hint for Becket's death, immediately communicated their thoughts to each other, and swearing to avenge their prince's quarrel, secretly withdrew. They took different routes, but moving in concert, and having an eye to the same end, arrived at the appointed place of meeting about the same time, and soon committed the horrid deed of assassination. Thus a supposed hint from a prince was sufficient for the murder of the prelate.

When the constitution was debated clause by clause in the convention, it was not insinuated by any of its opposers that the construction now contended for should ever be resorted to. The idea was never advanced that a man might be thus made a traitor by fiction and relation, and considered as constructively present and constructively an actor, though at the distance of several hundred miles from the place of action; much less that such a construction would ever be countenanced in any of our courts of justice. Not even so much as a conjecture was hazarded to that effect. It never entered into my mind, nor do I believe it entered into that of any other member of that body. And if the common law, with this doctrine



of constructive presence, had been a part of this constitution, all the talents on earth would never have been able to have carried it.

The people of Virginia thought themselves safe on this subject. The construction, now advocated, was not avowed, much less supported, in the state convention.

It is contended that this ought to be construed by the same rules as a common statutory crime. What is the reason, why, when an offence is made felony by statute, it has all the consequences of a felony at common law? When the legislature declare a particular offence in positive terms to be a felony, then it must necessarily in the nature of things, like all other felonies, partake of their incidents, nature and consequences; for it would not be a felony without having the qualities and conditions of a felony. But though this be the inevitable construction when a felony is created in general terms by a statute, yet if it be not so expressed, it is not to be interpreted so as to advance the remedy. There never was a question upon it as applied to statutes in capital cases. The books are uniformly against it; because penal laws must be strictly construed. The courts make an exception in favor of the accused, when there is the smallest departure from the letter of the statute. Is it not a principle that wherever a part fails to apply, the rest will be construed not to apply? If in England, a particular crime be created a felony, that is the generical description of the offence; and by the principles of the common law, all the consequences of a felony at common law follow. So that the common law is applied to and ingrafted on the statute. But as the common law does not exist in the United States, it cannot be constructively applied to treason. It is true that common law terms are adopted in the constitution and certain laws made under it; but they are not used in reference to the common law as a system, but in the common acceptance as mere terms of art; of which the true meaning may be found in any dictiona-

ry. And in relation to treason, the words used mean only a classification of the crime. They have no connexion with the common law. How then is it to be interpreted? The gentleman asks what the members of the convention would have said of this case. I am not sure what the members of the convention would have said of this construction, nor that any individual there would have said what his opinion was; but this I will undertake to say, that there never was a more fruitful source of oppression than this interpretation. The members of the convention would have particularly provided for such a case, if they had intended so uncommon a construction. They would have expressed it in the instrument itself, if they had contemplated a construction never heard of before; for you meet no instance of it in all the books. But there is no need of construction. The terms are plain. Constructive presence is neither expressed nor necessary to be implied. It was never thought of. But I will answer to the gentleman's question, what the members of the convention would have said, that, rather than that it was a "*casus omissus*," it was not intended to punish such offences. If it be asked why it was not mentioned, it may be answered, because it was not intended to be considered as guilt. But, without adopting this exposition, it may be said that it was left to the future care of the legislature to enact laws on the subject and punish acts of accessorial agency; so that nothing should be referred to the imagination. When laws should take place, they would be understood in the plain and natural sense of the terms employed to express them.

Mr. Hay and Mr. Wirt have availed themselves of a learned description of the statute of the United States, and the effect of its different clauses, in order to show the responsibility, as principal traitors, of persons standing in the situation of the accused; and that it is impossible that it could ever have been intended that they should escape unpunished. The legislature may pass laws, at any time, to prevent their impunity;

but if they were to escape by legislative failure or want of power, it would be better than that this court should transcend its authority and construe that to be treason which is not so within the true meaning of the constitution; which it would do, if it were to consider colonel Burr as present and an actor.

Both Mr. Hay and Mr. Wirt allege, that he ought not to be considered as an accessory; that he is the prime mover and projector; and, therefore, he ought not to escape punishment. If he escape, is it not because the law declares that he ought to escape? Ought they to complain, if the law pronounce him to be innocent? Is the acquittal of the accused, in a capital case, matter of regret? Ought any man to be punished but according to law?

By what rule, then, shall this question be decided? By example? Washington himself was assailed many years before he died. Jefferson has been also assailed; and Robertson, whose character was above censure, was also assailed. His history was assailed; but he left it to mankind to judge for him; and posterity will do him justice. (See his letter to Gibbon.) And many other great and eminent characters have been in like manner assailed. So that neither virtue nor talents can secure from censure and obloquy.

By prudence? What would prudence accomplish? Criticism is severe and unjust everywhere; and many, from mere motives of indolence, are indisposed to inquire: some from party spirit, malignity in general, and particular enmity. Every thing, even what had no affinity to the subject, would have been raked up, that could injure colonel Burr.

By the effect? Assertion is nothing. Testimony, complete and satisfactory, is not to be collected. What would have been the effect of the affidavits published against him in the public prints, though taken *ex parte*? If believed, for a moment, he ought not to have attended to them. The facility of denying that such a partial examination of witnesses ought to be



considered an acquittal would have rendered his efforts unavailing.

By communicating his answer to their suspicions, to men in office? Nothing would have led them to listen to him but curiosity. Government ought not to be answered till it call. All the protestations of innocence on earth would have had no effect. They would have been as unavailing as in a case of murder; but on every proper occasion, Burr did communicate and answer every call.

By imparting to confidential friends? It will be shown that he has done this always. After he had done it, they assailed him worse. If arguments like these prevail, do not use a cobweb veil; but give an air of magnanimity to your conduct by avowing a resolve to condemn and save trouble. Choose to be a Robespierre or a jury of Stuarts. If he make such communications, he is violently assailed. If he be silent, he is charged with mysterious conduct. It is true, that by the law of England, all persons concerned, principal and accessories, are equally punishable. As Mr. Hay says, the crime covers the whole ground; what is not occupied by the one is held by the other. What then? Does he mean to say, that because it is not so here, because the whole ground is not covered here, you must stretch the law sufficiently to cover it? Is this his plan for supplying omitted cases? Suppose an act merely preparatory, as writing a letter to advise or deputing an agent to encourage by a person who had never carried arms, nor been at Blannerhassett's, nor joined them at the mouth of Cumberland or any other place, could he be indicted as a principal who had carried arms and levied war? However unlawful such an act might be, it certainly could not amount to levying war. What the law would be on such occasion, I will not venture to say; but I ask, where is the book that declares it to be an act of levying war? Compare that part which you consider as authority, with that case, or that now before the court.

and you will find that neither case would be treason of levying war. Though a person, who forms a scheme and conducts it to maturity, and is at the head of his party, may be considered as a principal, yet he, who only performs a mere preparatory act, as writing a letter, giving an advice relative to the acts at Blannerhassett's island, cannot be deemed guilty of levying war. He cannot have levied war, when he has done nothing more than to advise. To advise treason, when the treason is not actually begun, cannot be considered more than as an accessorial act. Is there not a plain difference between these two cases?

The man, who instigates another to murder a man, is considered only as an accessory; because not in a situation to afford immediate assistance to the person who perpetrates the act. If you apply this reasoning to colonel Burr, as he was at a great distance, and could not give immediate aid to the actors, the same conclusion must result: that he could not be considered in any other light than that of an accessory before the fact. The gentleman says that Bonaparte was not present at the battle of Austerlitz. We know that he commanded the army; that he was on the ground; that he directed its movements and laid the plan of the battle, as much as if he had been in the heat of the action. He was present and the principal actor. When you consider this case according to the English decisions, you can never believe that Mr. Burr can be considered as being at Blannerhassett's island.

But we are told that he is not said to be at Blannerhassett's island; that he is not alleged to have been there. The indictment charges him with having committed treason on Blannerhassett's island, with a great multitude of persons traitorously assembled and gathered together, armed and arrayed in a warlike manner; that he and those persons joined together at Blannerhassett's island; and that he did with them, then and there, ordain, prepare and levy war against the United States. Is not this a declaration that he

was present? Could he have joined them there without being present with them? You must understand, most clearly, from the terms of the indictment, that he was actually there. It admits of no other construction. But, sir, the American decisions have been quoted upon this point. It is said that the opinion of the supreme court, in the case of Bollman and Swartwout, was that any person, "who performs any part, however minute, and however remote from the scene of action, and who is leagued in the general conspiracy, shall be considered as a traitor." The import of these words, "perform any part, however minute or however remote from the scene of action," as meant by the supreme court, has certainly been misunderstood by gentlemen. Does the opinion of the supreme court mean by these words, "minute and remote part," that a party may be indicted as present, who was absent? or that he who did not act, but merely advised, shall be indicted as having actually performed a part? The language of that court does not warrant the inference that the indictment may be so drawn as to mislead, instead of giving the accused notice of the proof to be exhibited against him, that he may prepare his defence. Does it mean that a person, at the distance of five hundred miles, shall be considered as present? Does it mean that they shall be punished according to the degree of their guilt? Does it mean to say that persons, in the character of accessories, shall be punished? Does it mean to say that there are no accessories in treason, and that all are principals? What then is the meaning of the opinion? It must be this: by "remote from the scene of action," must be intended that any person, directly and indissolubly connected with the party perpetrating the act, though not at the spot, but near enough to give immediate aid at the time and place, if necessary, is to be considered as engaged in the plot and guilty of treason. The judges viewed this subject without considering the question whether a man could be a principal notwithstanding his absence. Such an idea



never occurred. The constitution ought to be construed according to the plain and obvious import of its words. It will be in danger if there should be a departure from this construction. It never can be supposed that its framers intended that this fancy and imagination should be indulged in its future exposition.

But, say gentlemen, whether he be an accessory or a principal, the indictment stands right. I deny it, sir. We have the soundest reasons to say that it cannot be supported in either case. Regarding him as a principal, the evidence cannot support it; and as it does not charge him as an accessory, no evidence of accessorial acts could prove it. The specification of the offence, according to the evidence to be brought to support it, has been always held necessary in England, and will never be deemed less useful by the people of this country? Are we to regard British forms and precedents? You have seen what they are. There have been several quotations from Hale and others on this point. But one quotation from 1 Hale, p. 238, would establish my position, were it properly understood, though it is relied on by them to show that an accessory before the fact may be indicted generally or specially. This authority shows that an accessory after the fact must be specially charged; that the indictment against the receiver of a traitor "must be special of the receipt." But they contend, that the accessory before the fact, may be generally charged from these subsequent words, "and not generally that he did the thing, which may be otherwise, in case of one that is a procurer, counsellor or consenter." He refers to Conier's case as well as to Arden's case, in support of the principle, that receivers of traitors must be specially charged. But he refers to no authority as to an accessory before the fact. Authorities were read yesterday, to show that indictments for receiving and procuring, must stand on the same footing. Mr. Martin having so fully explained them, it will be sufficient for me to observe what may have escaped his notice. The words on which they found

their argument, are, "which may be otherwise in case of one that is a procurer," &c. Can this passage be absurd enough to mean, that though a receiver shall be specially indicted, so as to be informed of the charge to be proved against him, yet a procurer, whose offence is more heinous, is not to be notified of the accusation against him, but may be surprised by a general charge? He does not show in what manner it is to be otherwise; nor that it shall be, but that it may be otherwise. That he intended to speak of indictments for compassing the death of the king is unquestionable. It has been already sufficiently shown, that such indictments charge the compassing or imagining the death of the king in general terms; and that almost any thing, evincing an intention to kill him, or to subvert his government, is sufficient to support such a general accusation.

The case in *Kelynge*, before referred to, supports our construction; and Hale, in the place just quoted, adds that if the receiver were to be indicted in the same indictment with the principal offender, he ought to be "indicted specially of the receipt." And in the 2d vol. p. 223, heretofore quoted, he sufficiently shows that the procurer ought also to be specially charged. Sir, is it not necessary to inquire what is the consequence of the conduct of colonel Burr? If it be accessorial, the indictment must show the "*quomodo*." Why is any indictment in any case necessary? Why must indictments distinguish between principal actors in treason and those who are but accessorial agents? Because it informs them of the nature of the accusation and enables them to defend themselves. The indictment against the adviser or procurer ought to notify him of the act of which he is considered the indirect perpetrator. You must show the manner in which he is liable.

Nor does this doctrine rest on English authority alone. It is not merely founded on the common law, as has been urged. It is supported by the principles of pleading, which we have adopted. The forms of

pleading show the sense of courts, as guides to reason. The eighth amendment of the constitution also requires it. It not only secures the enjoyment "of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed," but also that the accused "shall be informed of the nature and cause of the accusation, confronted with the witnesses against him," &c.

Consider this subject attentively. Reflect on the mode of prosecution which is advocated, and see whether it do not deprive us of this constitutional privilege. The language of any man, addressed to the accused on this subject, would be, "you are charged with treason; but you are to be informed of the nature and cause of the accusation, so as to enable you to prepare your defence." The indictment is shown him. It tells him that he actually levied war by raising men and committing acts on a particular day and at a particular place. Knowing his innocence of the charge, he pleads not guilty and produces testimony to prove that he was not there; that during the whole time he was many hundred miles distant, or perhaps beyond sea. Against all this, when he comes to be tried, he is told, "it was not you that raised the army. We do not mean that you were there in person. You needed not to have summoned twenty or thirty witnesses to prove that you were not present. But you did what we insist is the same thing as levying war. You wrote a letter, in which you advised the thing to be done." He would very naturally answer, "if that be your meaning, I have been misled and deceived; I am not prepared for trial; and I pray that the cause may be continued." But he is told, "your prayer cannot be granted. The jury are sworn and you must take your trial."

Now, sir, should it be in the power of any government thus to mislead and destroy any man it may select for its victim? (I do not pretend to say that such is the disposition of this government; nay, I am sure that it is not.) But no child, who could read



the constitution, would suppose that it could be ever so construed. Yet, sir, what babies we were if we expected the constitution to be thus correctly construed! If this construction be adopted and this species of indictment admitted, it will pervert this very palladium of our safety into an instrument of destruction. Mr. Hay knows that I intend nothing offensive to him. But when he tells me that his indictment fits this case, he deceives us. He deludes us into a trial in ignorance of the accusation, and drags us blindfold to the scaffold. This is the most intolerable hardship. Examine history from the beginning of the world, you will find nothing like the character of an American legislature, who, professing to be the votaries of liberty and to admire the principles of a free constitution, would permit such horrid oppression of their citizens: to keep them in the dark, to hold out the semblance of security to innocence, but to expose it to inevitable destruction! Sir, I could mention a thousand acts of oppression that would not be so severe as this. The party accused is entrapped and ensnared. He is taken by surprise and forced into a trial with the rope round his neck, without any means of preparation or defence. This is substance; not a phantom of the imagination. The forms of trial, the instruments of nominal justice, are to be wrought up into an engine of destruction. We call on you as guardians of this constitution, as far as depends on your acts, to preserve it from violation. I ask you to remember the difficulty of repairing the mischiefs of an oppressive construction, and permitting, unopposed, encroachments on the dearest privileges of the people. If this attempt be successful, where will persecution stop? If this be correct, fate has sealed it in your mind; and the law is only to force it. I feel myself so much roused by the idea of the effect that this doctrine would have, that did I not know that it came from a pure source without any intention to injure or oppress, I would be alarmed. I would say, as Paul said to Agrippa, believest thou in the constitu-

tion? I know thou dost. I ask you to save this rock of our salvation. For myself I do not care. I have not much to care, with respect to the remainder of my life. But for my children I feel the affection and solicitude natural to a parent; and for my country, those sentiments of patriotism which become every good citizen. Let not the great palladium of public liberty be undermined. I pray you, that the rights of the citizen may not be immolated at the shrine of faction and persecution; that innocence may not be ingulfed by the adoption of the doctrine of the prosecutors. American judges never can do this. I was going to use language too strong; American judges dare not do it.

[Mr. Randolph here replied to several arguments of the opposite counsel; he then concluded his speech as follows.]

Let me add a few words, with respect to the necessity of force, to what has been already said on that subject. According to what has been often observed in the course of this trial, the crime consists of the beginning, the progress, and consummation; in the course of which, some force must be exhibited. A man might begin a crime and stop short and be far from committing the act. He might go on one step still further, without incurring guilt. It is only the completion of the crime that the law punishes. Suppose an army were embodied by Mr. Burr; and they only assembled and separated without having committed any act; what would the government have to complain of? When they punish a man for murdering another, it is because he is dead. When a man is punished for a robbery, it is because a person has been put in fear and his property taken from him without his consent. So it is with respect to every other crime: while it is in an incipient state it is disregarded. No person is punishable, who is only charged with such an inchoate incomplete offence. The intention is never punished. In such cases time is allowed for repentance, at any time before its consummation.



Such an offence as this is never punishable, unless in the case of a conspiracy; and even on a prosecution charging that offence specially, the act of conspiring must be satisfactorily established. Here no injury has arisen to the commonwealth. No crime has been perpetrated. The answer to this is, that there were preparations to commit it. As far as communications have been made to the government, there is no possibility of proving a complete act, yet those accused must be punished. Then their rule of law is, that wherever there is a beginning of a crime, it shall be punished lest it should grow to maturity! Is this the spirit of American legislation and American justice? Is it the spirit of its free constitution to consider the germ as the consummation of an offence? the intention, so difficult to be ascertained and so easy to be misrepresented and misunderstood, as the act itself? In such a system it may be a source of lamentation, that no more than death can be inflicted on the completion of the crime. Death, death, is to be the universal punishment, the watchword of humane legislation and jurisprudence!

When we mentioned the idea of force, I was not a little amazed at the manner in which they attempted to repel the argument. It was said that they were prepared to show potential force; that fear was used; that an assemblage was drawn together to act on the fears of the people. This fear begins at New Orleans, mounts the Mississippi against the stream, and fixes itself at Blannerhassett's island. Henry IV. fell a sacrifice to the predictions of the Jesuits. They determined to destroy him, and predicted that he would fall; and he did fall. I may safely admit that fear really existed at New Orleans; because the man, who was interested to excite it, had it in his power most effectually to do so. A great conspiracy with vast numbers and means is feigned. A particular day is announced as the time of attack. The militia are brought together. They "surround the city, spread the alarm in the coffee-houses and other public places;



guard the river, for they are coming in the next flood of the Mississippi." Thus terror and apprehension were excited by every stratagem imaginable. Are we to be sacrificed by base and insidious arts like these? by the artifices of a man interested in our destruction to effect his own preservation?

I have done, sir. I find myself hurt, that I could not give a greater scope to my feelings on this all important subject. I will only add one remark; which I hope will be excused and considered as applying to all who occupy the sacred seat of justice. Judges have passed through the temple of virtue and arrived at that of honor; but we find, that it is a just decree from the free will of the people, that the floor of that temple is slippery. Some may suppose that because the wheel of fortune is not seen immediately to move, it is at rest. The rapidity deceives the sight. He who means to stand firm in that temple, must place his hand on the statue of wisdom; the pedestal of which is a lion. These are the only qualities by which they can be useful in their honorable station. Popular effusion and the violence and clamor of party they will disregard. It is the more necessary, as judges may hereafter mingle in politics; and they are but men; and the people are divided into parties. In the conflicts of political animosity, justice is sometimes forgotten or sacrificed to mistaken zeal and prejudice. We look up to the judiciary to guard us. One thing I am certain of, that you will not look at consequences; that you will determine "*fiat justitia*" let the result be what it may.

# SPEECH OF WILLIAM PINKNEY,

IN THE CASE OF

THE NEREIDE,

BEFORE THE SUPREME COURT OF THE UNITED STATES,  
1815.\*



Mr. Pinkney for the Captors.

If I were about to address this high tribunal with a view to establish a reputation as an advocate, I should feel no ordinary degree of resentment against the gentleman whom I am compelled to follow;† if indeed it were possible to feel resentment against one who never fails to plant a strong and durable friendship in the hearts of all who know him. He has dealt with this great cause in a way so masterly, and has presented

\* "At the session of the court in 1815, was brought to a hearing the celebrated case of the *Nereide*, the claim in which had been rejected in the district court of New York, and the goods condemned upon the ground that they were captured on board of an armed enemy's vessel which had resisted the exercise of the right of search. This cause had excited uncommon interest on account of the very great importance and novelty of the questions of public law involved in it, as well as the reputation of the advocates by whom it was discussed.

The claimant, Mr. Pinto, was a native and resident merchant of Buenos Ayres, which had declared its independence of the parent country, although it had not yet been acknowledged as a sovereign state by the government of this country. Being in London in 1813, he had chartered the British armed vessel in question, to carry his goods, and other the property of his father and sister, to Buenos Ayres, and took passage on board the vessel, which sailed under British convoy, and, having been separated from the convoying squadron, was captured off the island of Madeira, after a short action, by the United States' privateer Governor Tompkins."—*Wheaton's Life of Pinkney*, p. 126.

† Mr. Dallas.

it before you with such a provoking fulness of illustration, that his unlucky colleague can scarcely set his foot upon a single spot of it without trespassing on some one of those arguments which, with an admirable profusion, I had almost said prodigality, of learning, he has spread over the whole subject. Time, however, which changes all things, and man more than any thing, no longer permits me to speak upon the impulse of ambition. It has left me only that of duty; better, perhaps, than the feverish impulse which it has supplanted; sufficient, as I hope, to urge me, upon this and every other occasion, to maintain the cause of truth, by such exertions as may become a servant of the law in a forum like this. I shall be content, therefore, to travel after my learned friend, over a part of the track which he has at once smoothed and illuminated, happy, rather than displeased, that he has facilitated and justified the celerity with which I mean to traverse it; more happy still if I shall be able, as I pass along, to relieve the fatigue of your honors, the benevolent companions of my journey, by imparting something of freshness and novelty to the prospect around us. To this course, I am also reconciled by a pretty confident opinion, the result of general study as well as of particular meditation, that the discussion in which we are engaged has no claim to that air of intricacy which it has assumed; that, on the contrary, it turns upon a few very plain and familiar principles, which, if kept steadily in view, will guide us, in safety, through the worse than Cretan labyrinth of topics and authorities that seem to embarrass it, to such a conclusion as it may be fit for this court to sanction by its judgment.

I shall in the outset dismiss from the cause whatever has been rather insinuated with a prudent delicacy, than openly and directly pressed by my able opponents, with reference to the personal situation of the claimant, and of those with whom he is united in blood and interest. I am willing to admit that a Christian judicature may dare to feel for a desolate foreigner who



stands before it, not for life or death indeed, but for the fortunes of himself and his house. I am ready to concede, that when a friendly and a friendless stranger sues, for the restoration of his all, to human justice, she may sometimes wish to lay aside a portion of her sternness, to take him by the hand, and, exchanging her character for that of mercy, to raise him up from an abyss of doubt and fear to a pinnacle of hope and joy. In such circumstances, a temperate and guarded sympathy may not unfrequently be virtue. But this is the last place upon earth in which it can be necessary to state, that, if it be yielded to as a motive of decision, it ceases to be virtue, and becomes something infinitely worse than weakness. What may be the real value of Mr. Pinto's claim to our sympathy, it is impossible for us to be certain that we know; but thus much we are sure we know, that whatever may be its value in fact, in the balance of the law it is lighter than a feather shaken from a linnet's wing, lighter than the down that floats upon the breeze of summer. I throw into the opposite scale the ponderous claim of war; a claim of high concernment, not to us only, but to the world; a claim connected with the maritime strength of this maritime state, with public honor and individual enterprise, with all those passions and motives which can be made subservient to national success and glory in the hour of national trial and danger. I throw into the same scale the venerable code of universal law, before which it is the duty of this court, high as it is in dignity, and great as are its titles to reverence, to bow down with submission. I throw into the same scale a solemn treaty, binding upon the claimant and upon you. In a word, I throw into that scale the rights of belligerent America, and, as embodied with them, the rights of these captors, by whose efforts and at whose cost the naval exertions of the government have been seconded, until our once despised and drooping flag has been made to wave in triumph where neither France nor Spain could venture to show a prow. You may call these rights by what

name you please. You may call them iron rights: I care not: it is enough for me that they are rights. It is more than enough for me that they come before you encircled and adorned by the laurels which we have torn from the brow of the naval genius of England: that they come before you recommended, and endeared, and consecrated by a thousand recollections which it would be baseness and folly not to cherish, and that they are mingled, in fancy and in fact, with all the elements of our future greatness.

[Mr. Pinkney contended that the property ought to be considered as good prize of war on the following grounds.

First. That the treaty of 1795, between the United States and Spain, contained a positive stipulation, adopting the maxim of what has sometimes been called the law of nations, that; "free ships make free goods;" and that although it did not expressly mention the converse proposition, that "enemy ships should make enemy goods," yet it did not negative that proposition; and as the two maxims had always been associated together in the practice of nations, the one was to be considered as implying the other.

Second. That by the Spanish prize code, neutral property, found on board enemies' vessels, was liable to capture and condemnation, and that this being the law of Spain, applied by her when belligerent to us and all other nations when neutral by the principle of reciprocity, the same rule was to be applied to the property of her subjects, which Mr. Pinto was to be taken to be, the government of the United States not having at that time acknowledged the independence of the Spanish American colonies.

Third. That the claim of Mr. Pinto ought to be rejected on account of his unneutral conduct in hiring, and putting his goods on board of an armed enemy's vessel, which sailed under convoy, and actually resisted search.

After discussing the two first of the abovementioned grounds of argument, Mr. Pinkney proceeded.]

I come now to the third and last question, upon which, if I should be found to speak with more confidence than may be thought to become me, I stand upon this apology, that I have never been able to persuade myself that it was any question at all. I have consulted upon it the reputed oracles of universal law, with a wish disrespectful to their high vocation, that they would mislead me into doubt. But—*pia sunt, nullumque nefas oracula suadent*. I have listened to the counsel for the claimant, with a hope produced by his reputation for abilities and learning, that his argument would shake from me the sturdy conviction which held me in its grasp, and would substitute for it that mild and convenient scepticism that excites without oppressing the mind, and summons an advocate to the best exertion of his faculties, without taking from him the prospect of success, and the assurance that his cause deserves it. I have listened, I say, and am as great an infidel as ever.

My learned colleague, in his discourse upon this branch of the subject, relied, in some degree, upon circumstances, supposed by him to be in evidence, but by our opponents believed to be merely assumed. I will not rely upon any circumstances but such as are admitted by us all. I take the broad and general ground, which does not require the aid of such special considerations as might be borrowed from the contested facts.

The facts, which are not contested, are these: the claimant, Manuel Pinto, intending to make a large shipment of British merchandize from London, (where he then was,) to Buenos Ayres, (the place of his ordinary residence,) for himself and other Spaniards, and moreover to take on freight, and with a view to a commission on the sales, and a share in the profits, in South America, other merchandize belonging to British subjects, chartered at a fixed price, in the summer of 1813, the British ship the Nereide, for those purposes. The Nereide was armed, either at the time of the charter or afterwards, with ten guns; and her ar-



mament was authorized by the British government, and recognized by the usual document. The merchandise being all laden, the ship sailed upon her voyage under British convoy, (as the owner had, in the charter party, stipulated she should do,) with the claimant, Pinto, and several passengers introduced, as I think, by him, on board, and with sixteen or seventeen hands. She parted convoy soon afterwards, and was met by the Governor Tompkins privateer, by which she was conquered, seized and brought in as prize, after a resistance of several minutes, in the course of which the Nereide fired about twenty guns. Some of the passengers co-operated in this resistance, but Pinto did not, nor, as far as is known, did he encourage it.

I shall consider the case, then, as simply that of a neutral, who attempts to carry on his trade from a belligerent port, not only under belligerent convoy, but in a belligerent vessel of force, with full knowledge that she has capacity to resist the commissioned vessels, and, (if they lie in her way,) to attack and subdue the defenceless merchant ships of the other belligerent, and with the further knowledge that her commander, over whom, in this respect, he has no control, has inclination and authority, and is bound by duty so to resist, and is inclined and authorized so to attack and subdue. I shall discuss it as the case of a neutral, who advisedly puts in motion, and connects his commerce and himself with a force thus qualified and conducted; who voluntarily identifies his commerce and himself with a hostile spirit, and authority, and duty, thus known to and uncontrollable by him; who steadily adheres to this anomalous fellowship, this unhallowed league between neutrality and war, until in an evil hour it falls before the superior force of an American cruiser, when, for the first time, he insists upon dissolving the connexion, and demands to be regarded as an unsophisticated neutral, whom it would be barbarous to censure, and monstrous to visit with penalty. The gentlemen tell us that a neutral may do all this!

I hold that he may not, and if he may, that he is a "chartered libertine," that he is *legibus solutus*, and may do any thing.

The boundaries, which separate war from neutrality, are sometimes more feint and obscure than could be desired; but there never were any boundaries between them, or they must all have perished, if neutrality can, as this new and most licentious creed declares, surround itself upon the ocean with as much of hostile equipment as it can afford to purchase, if it can set forth upon the great common of the world, under the tutelary auspices, and armed with the power of one belligerent, bidding defiance to and entering the lists of battle with the other, and, at the same moment, assume the aspect and robe of peace, and challenge all the immunities which belong only to submission.

My learned friends must bear with me if I say, that there is in this idea such an appearance of revolting incongruity, that it is difficult to restrain the understanding from rejecting it without inquiry, by a sort of intellectual instinct. It is, I admit, of a romantic and marvellous cast, and may, on that account, find favor with those who delight in paradox; but I am utterly at a loss to conjecture how a well regulated and disciplined judgment, for which the gentlemen on the other side are eminently distinguished, can receive it otherwise than as the mere figment of the brain of some ingenious artificer of wonders. The idea is formed by a union of the most repulsive ingredients. It exists by an unexampled reconciliation of mortal antipathies. It exhibits such a rare *discordia rerum*, such a stupendous society of jarring elements, or, (to use an expression of Tacitus,) of *res insociabiles*, that it throws into the shade the wildest fictions of poetry. I entreat your Honors to endeavor a personification of this motley notion, and to forgive me for presuming to intimate, that if, after you have achieved it, you pronounce the notion to be correct, you will have gone a great way to prepare us, by the authority of your opinion, to receive as credible history, the worst parts of



the mythology of the Pagan world. The Centaur and the Proteus of antiquity will be fabulous no longer. The *prosopopœia*, to which I invite you, is scarcely, indeed, within the power of fancy, even in her most riotous and capricious mood, when she is best able and most disposed to force incompatibilities into fleeting and shadowy combination; but if you can accomplish it, will give you something like the kid and the lion, the lamb and the tiger portentously incorporated, with ferocity and meekness co-existent in the result, and equal as motives of action. It will give you a modern Amazon, more strangely constituted than those with whom ancient fable peopled the borders of the Thermodon—her voice compounded of the tremendous shout of the Minerva of Homer, and the gentle accents of a shepherdess of Arcadia—with all the faculties and inclinations of turbulent and masculine war, and all the retiring modesty of virgin peace. We shall have in one personage the *pharetrata Camilla* of the *Æneid*, and the Peneian maid of the *Metamorphosis*. We shall have neutrality, soft and gentle and defenceless in herself, yet clad in the panoply of her warlike neighbors; with the frown of defiance upon her brow, and the smile of conciliation upon her lip; with the spear of Achilles in one hand, and a lying protestation of innocence and helplessness unfolded in the other. Nay, if I may be allowed so bold a figure, in a mere legal discussion, we shall have the branch of olive entwined around the bolt of Jove, and neutrality in the act of hurling the latter under the deceitful cover of the former!

\* \* \* \* \*

I must take the liberty to assert, that if this be law, it is not that sort of law which Hooker speaks of, when, with the splendid magnificence of eastern metaphor, he says, that “her seat is the bosom of God, and her voice the harmony of the world.” Such a chime-ra can never be fashioned into a judicial rule fit to be tolerated or calculated to endure. You may, I know, erect it into a rule; and when you do, I shall, in com-



mon with others, do my best to respect it; but, until you do so, I am free to say, that in my humble judgment, it must rise upon the ruins of many a principle of peculiar sanctity and venerable antiquity, which "the wing of time has not yet brushed away," and which it will be your wisdom to preserve and perpetuate.

If I should be accused of having thus far spoken only or principally, in metaphors, I trust I am too honest not to plead guilty, and certainly I am not ashamed to do so: for, though my metaphors, hastily conceived and hazarded, will scarcely bear the test of a severe and vigorous criticism, and although I confess that under your indulgence, I have been betrayed into the use of them, by the composition of this mixed and (for a court of judicature,) uncommon audience. I trust that they will be pardoned upon the ground that they serve to mark out and illustrate my general views, and to introduce my more particular argument.

I will begin by taking a rapid glance at the effect which this imagined license to neutrals, to charter the armed commercial vessels of a belligerent, may produce upon the safety of the unarmed trade of the opposite belligerent: and I deceive myself greatly, if this will not of itself, dispose us to reject the supposition of such a license.

It will not be denied, that, if one neutral may hire such a vessel from a belligerent, every neutral may do so. The privilege does not exist at all, or it is universal. The consequence is, that the seas may be covered with the armed ships of one of the parties to the war, by the direct procurement, and at the sole expense, of those who profess to be no parties to it. What becomes, then, of the defenceless trade of the other party to the war? Is it not exposed by this neutral interference to augmented peril, and encountered by a new repulsion? Are not the evils of its predicament inflamed by it? Is not a more ample hostility, a more fearful array of force provided for its

oppression? Can it now pass at all where before it passed with difficulty and hazard? Can it now pass without danger, where before it was in perfect safety?

Suppose one of the contending powers to be greatly superior in maritime means to the other; what better expedient could be devised to make that superiority decisive and fatal, than to authorize neutrals to foster it into activity by subsidies under the name of freight, to draw it out upon the ocean, with a ripe capacity for mischief, to spread it far and wide over its surface, and to send it across every path which the commerce of the weaker belligerent might otherwise hope to traverse? Call you that neutrality, which thus conceals beneath its appropriate vestment, the giant limbs of war, and converts the charter party of the computing-house into a commission of marque and reprisals; which makes of neutral trade, a laboratory of belligerent annoyance; which, with a perverse and pernicious industry, warms a torpid serpent into life, and places it beneath the footsteps of a friend with a more appalling lustre on its crest, and added venom in its sting; which for its selfish purposes feeds the fire of international discord, which it should rather labor to extinguish, and in a contest between the feeble and the strong enhances those inequalities that give encouragement to ambition and triumph to injustice?

I shall scarcely be told that this is an imaginary evil. I shall not, in this court, hear it said, as I think it has elsewhere been said,\* that the merchant vessel of a belligerent, (of England especially,) armed under the authority of the state, and sailing under a passport which recognizes that armament, has not a right to attack, and, if she can, to capture such enemy vessels as may chance to cross her track.

[Mr. Emmet.—I shall maintain that she has no such right. She can capture only when she is herself assailed. She may be treated as a pirate, if she is the

\* At the hearing of the cause in the court below.

assailant. Where are the authorities that prove the contrary?]

Where are my authorities? They are everywhere. Common sense is authority enough upon such a point; and if the recorded opinions of jurists are required, they are already familiar to the learning of this court. The doctrine results in the clearest manner from the nature of solemn war, as it is viewed by the law of nations; and it should seem rather to be the duty of my opponents to produce authorities to show that this obvious corollary has been so restrained and qualified by civil regulations, or convention, or usage, as no longer to exist in the extent which I ascribe to it. But I undertake, myself, to produce ample proof that my doctrine is in its utmost extent correct.

It is stated in Rutherford's *Institutes*, (vol. 2, p. 576—578,) that by the law of nations, a solemn war makes all the members of the one contending state the enemies of all the members of the other, and, as a consequence, that by that law a declaration of war does in itself authorize every citizen or subject of the nation which issues it to act hostilely against every citizen or subject of the opposite nation. It is further stated, in the same book, (p. 577, 578,) that, as the nation which has declared war has authority over its own subjects, it may restrain them from acting against the other nation in any other manner than the public shall direct, and, of course, that notwithstanding the general power implied in a declaration of war, it may happen that none can act in war, except those who have particular orders or commissions for this purpose. But, (it is added,) "this restraint, and the legal necessity which follows from it, that they who act should have particular orders or commissions for what they do, arises, not from the law of nations, or from the nature of war, but from the civil authority of their own country. A declaration of war is, in its own nature, a general commission to all the members of the nation to act hostilely against all the members of the adverse nation. And all restraints, that are laid upon



this general commission, and make any particular orders or commissions necessary, come from positive and civil institution." I might now ask, in my turn, where are the authorities, or documents of any sort, that show the imposition or existence of these restraints upon English vessels, without which restraints the Nereide might lawfully have assailed, and (if strong enough,) captured any American vessel that came in her way?

Vattel, who is not a very precise or scientific, although a very liberal writer, states the law as it is laid down by professor Rutherford. (Mr. Pinkney here quoted from Vattel, *Droit des Gens*, liv. 5, ch. 15, s. 226.)

The rule in Vattel, as it applies to the peasantry of a country, is connected with another—that they shall not ordinarily be made the objects of hostility. This exemption implies a corresponding forbearance, on their part, to mingle without the orders of the state in offensive war; and they are punished if they violate the condition of the immunity. This apparent severity is real mercy; for its object is to keep the peasantry at home, and to confine the contentions, and, consequently, the direct effects of war, to the troops who are appointed by the state to fight its battles. But a non-commissioned merchant vessel upon the high seas has nothing of this exemption. She cannot purchase it by forbearance; nay, she is at every moment the chosen object of hostility, as she is at every moment peculiarly exposed to it.

So far as the supposed usage applies to privateers, it has no bearing upon this case. It may be proper to confine to commissioned vessels the right of cruising for the mere purposes of war and prize. Yet it may be equally proper to leave to an armed merchant vessel the smaller and incidental right, (modified and checked in its exercise by such municipal regulations as each belligerent may and always does find it expedient to provide,) to act offensively against the public enemies, if she chances to encounter them. At any

rate, as the armament of a merchant vessel is sanctioned by the state to which she belongs, and is evidenced by its passport, it must depend altogether upon the laws of that state, whether this sanction amounts to a permission to commit hostilities *in transitu* or not. And I think I may venture to assert, that whatever inferences may be drawn from loose and general *dicta* to be found in a very few works upon the law of nations, no instance can be produced, in which a merchant ship, attacking an enemy vessel, in the course of her voyage, has received the treatment which the learned counsel for the claimant has allotted to such a proceeding, or has, in any manner, been punished, or even in any degree censured.

The notions of Azuni appear, (as far as any intelligible notions can be collected from his work, called a *Treatise on the Maritime Law of Europe*,) to be similar to those of Vattel, and, consequently, do not touch the point under consideration. This writer has not been able to satisfy himself as to the propriety of the practice of privateering; or, rather, he is the undisguised advocate, in different parts of his book, of the two opposite opinions, that it is a very bad practice, and a very good one. Thus, in Part 2d, ch. 4, s. 13, (p. 232 of the translation,) he inveighs, with an amiable vehemence, against it, bringing the Abbe Mably to his assistance; and in the next chapter, (p. 350,) gives us a proud panegyric upon it, and stigmatizes its censurers (and of course himself and the "virtuous Mably,") as "pretended philosophers," and as shallow and malignant declaimers. Admit, however, that this member of a score of academies does seem to have been steadily of opinion, that a cruiser, without a commission, or something equivalent to a commission, must be regarded as "a pirate or sea-robber"—"*Per mare discurret deprædandi causa*," is true, as he tells us, of a privateer, as well as of a pirate. They differ, as he also assures us, in this; that the latter pursues all vessels indiscriminately, (as Casaregis expresses it,) "*sine patentibus alicujus principis, ex*



*propria tantum ac privata auctoritate;*" or as Azuni himself phrases it, "without any commission or passport from any prince or sovereign state;" whilst the former attacks public enemies only, and has a special authority for that object. Now, although I am not convinced that a cruiser against public enemies, is necessarily a pirate, because she wants a commission, and am even very sure of the contrary, I content myself with asking, if all this is not (as well as what has been quoted from Vattel,) quite aside from the case of an armed merchant vessel, sailing under the passport of the sovereign, to whose subjects she belongs, not as a cruiser for prize or plunder, not *depredandi causa*, but for commercial purposes, and upon a commercial voyage, and only using her authorized force as an assailant, when an enemy more feeble than herself comes within her power?

But if a thousand such writers as Azuni, or even writers of a much higher order, had inculcated (as they do not,) the general idea, that an armed merchant vessel ought only to defend herself, and can never attack without becoming criminal, I should still have this successful reply, that it is not for a general rule that I am bound to contend; that the Nereide was an English ship; and that it is, therefore, enough for me to show, upon this matter, the law of England, as it has always been held by her prize tribunals, and acquiesced in by the rest of the world. I might, indeed, maintain, that when I show the unresisted and uncomplained of law and custom of that country upon a great maritime subject, I have gone very far to show the law and custom of Europe, or at least what they ought to be; but as my purpose does not require that I should occupy so wide a field, I shall use the English authorities merely as supporting the doctrine (unquestionable in itself,) which I have quoted from Rutherford and Vattel, and as proving that England has not introduced, or made herself a party to, those restraints, to which the right of offensive warfare, possessed upon original principles, by her armed merchant vessels,



is alleged to be subject; but, on the contrary, that her government and courts of prize always have asserted, in the most explicit manner, the existence of this right, and always have encouraged its practical exercise.

When the cases, to which I am about to refer for this purpose, come to be considered, it will be proper to bear in mind the distinction between the right which a capturing ship acquires in the thing captured, and the validity or legality of that capture. Without a constant attention to this distinction, which is manifestly the creature of municipal law, the English authorities cannot be understood. In England it depends upon the prize act and the royal proclamation, who shall be regularly entitled to the benefit of prizes. The property of all prizes is originally in the government, and it grants that property how and to whom it pleases. The interest in prize is guaranteed only to a commissioned captor. A non-commissioned vessel cannot, therefore, take for her own benefit, but she may take, (and that too as an assailant,) for the benefit of the king or lord high admiral, and may expect, and always does receive, the whole or a part of the proceeds from the justice, or if you choose, the politic bounty of the crown, judicially not arbitrarily dispensed, as a reward for the capture. If this be so, there is no difference, according to the English law, between a commissioned and a non-commissioned captor, so far as regards the legality of the seizures made by them of the property of enemies. The sole difference is that a commissioned captor has a positive title, (derived from the previous act of the government,) to the thing taken and that the non-commissioned captor has no such positive title, but is referred altogether for his reward to what is called the discretion of the executive government, which, however, is not a capricious discretion, but is to be guided and carried into effect by the court of admiralty, with a view to the circumstances of each case.

The cases to which I shall refer, (principally in

Robinson's Admiralty Reports,) will be found, as I trust, to be perfectly conclusive on this subject.

The case of the Haase, (Rob. Adm. Rep. vol. 1, p. 286,) was that of an enemy ship, taken near the Cape of Good Hope, by a non-commissioned captor, and condemned by the high court of admiralty as a *droit*. The capturing ship (which was a South Sea whaler,) was the assailant, and took possession of the prize without resistance. The court gave the whole of the proceeds to the captors upon the ground of peculiar merit in following part of the cargo (which was gunpowder,) on shore. Now if this capture was piratical, the condemnation as prize, and the reward decreed to the captors by way of encouraging them and others to the perpetration of similar outrages, will require more apology than the judgments of that great man, sir William Scott, are usually supposed to stand in need of.

In the same book (in a note to the case of the *Rebeckah*, p. 231,) the orders in council of 1665, containing the grant to the lord high admiral of such prizes as are now called *droits* of admiralty, are set forth. The second article is, "that all enemies' ships and goods casually met at sea, and seized by any vessel not commissioned, do belong to the lord high admiral." I suppose that nobody can fail to perceive that this article expressly recognizes the validity of the seizures of which it speaks, without regarding who may be the assailants, it being sufficient that the ships and goods belong to "enemies," and are "casually met at sea." The article not only recognizes the validity of every such seizure, and its legal effect as producing prize of war for the crown, but founds upon it a beneficial grant to the lord high admiral. And the subsequent practice has been in conformity with the article, except only that (the office of lord high admiral being discontinued) the crown now takes the prize, (as it originally took it,) subject to the captors' claim in the nature of salvage or reward.

The case of the *San Bernardo*, in the same volume,



(p. 178.) was that of a recapture, in 1799, of a Spanish ship out of the hands of the French, by an English non-commissioned vessel. The recaptured vessel, being enemy's property, was condemned as a *droit*, and a reward out of the proceeds was decreed to the recaptors, although they were not, and could not, under the circumstances stated, be attacked by either the French vessel or the Spanish. Upon this case it is only necessary to remark, that if a non-commissioned vessel cannot capture an enemy's vessel, without being first assailed, neither can she recapture unless on the same condition, an enemy vessel from an enemy vessel. In truth, such a recapture is rather a double capture, with reference to those upon whom it acts—since it acts upon two belligerents at the same time.

In the second volume of Robinson's Admiralty Reports, (p. 284,) in a note to the case of the *Cape of Good Hope*, the cases of the *Spitfire* and *Glutton* are reported. In both these cases, shares were allowed on account of the non-commissioned vessels, (which not only assailed but chased for a considerable time,) as *droits* of admiralty. These were cases of what is called co-operation between commissioned and non-commissioned vessels; and, consequently, no cases could more explicitly assert the equality, (not in point of innocence only, but in legal effect,) between the acts of a non-commissioned vessel and those of a commissioned vessel in attacking and subduing the ship of an enemy. If the acts of the non commissioned vessels, were, on these occasions, considered as piratical, or in any degree unlawful, or otherwise reprehensible, nothing could have been less admissible than to let in the crown to shares, on the foundation of those acts, to the prejudice of those who had an acknowledged right by their commission, by the king's proclamation, and by act of parliament, to make the captures for their own exclusive benefit. And this impropriety was particularly manifest in the case of the *Spitfire*, who, although she chased in concert with



the Providence, does not appear to have contributed to the capture otherwise than constructively.

If it should be said that the authority of the non-commissioned auxiliary captors depended upon and arose out of the authority, or out of the principal agency, of the commissioned captors with whom they acted, the answer is fourfold. First. That none of the other cases support such a notion. Secondly. That the authority of the commissioned captors was not a communicable authority. Thirdly. That if the non-commissioned captors acted (in contemplation of law,) under the authority of the commissions of the other ships, there could have been no question about droit; the whole would have been disposed of as prize under the act of parliament. And, fourthly, that in the case of the *Glutton*, she (having no commission at all,) was, by reason of her being far to windward when the prize hove in sight, and of her using that advantage with promptitude and dexterity, without any orders from, or subserviency to, the ships that were commissioned, the main cause of the capture, and that it was certified by the commanders of the other ships that this was so, and that but for the *Glutton* the capture would have been impossible. The *Glutton*, the non-commissioned vessel, led, therefore, in this enterprise, and the others simply co-operated with her as a principal. So that the two cases, taken together, affirm distinctly the perfect legality of an attack by a non-commissioned captor, whether secondarily and in dependence upon, or primarily and (as *dux facti*) independently of, a commissioned captor, who co-operates with him; and, consequently, they affirm that a non-commissioned vessel may alone attack, and, if she is able, capture. And here it ought to be observed, that in the principal case, (the *Cape of Good Hope*,) the universal legality of attack and capture by non-commissioned vessels is taken (as how could it be otherwise?) for granted by the court, and admitted by every body. Indeed, I feel confident, that it is now questioned for the first time.

To the cases already mentioned, may be added that of the *Fortuna*, (Rob. Adm. Rep. vol. 4, p. 78,) as that of a recapture of an English ship, with a French cargo on board, by non-commissioned persons who were not assailed. The ship was restored to her owner, but the cargo was condemned as a *droit*, and the whole proceeds (of small amount,) were decreed to the captors. Another protected and rewarded piracy!

In the case of the *Melomasne*, (Rob. Adm. Rep. vol. 5, p. 41,) the law is laid down without any exception, and in the most precise terms, that a capture by a non-commissioned vessel is rightful, although it enures to the benefit of the king in his office of admiralty, in the manner already explained. Exclusively of the consideration that the court, in laying down the general rule in that case, does not limit it to the case of defence, as it would undoubtedly have done if it had conceived the rule to be subject to that limitation, even if the case in which it was pronouncing its judgment was not that of an attack, it is decisive that by its sentence it sustains the capture, as a *droit*, by the non-commissioned captor, who was the sole assailant, and rejects the claim of captain Aylmer of the *Dragon*, a king's ship, who claimed the prize against the admiralty, as having been made under his authority, which authority was considered by the court, however, as amounting to no authority at all, and therefore as leaving the case to be dealt with as that of a capture by a non-commissioned boat, and consequently, a capture for the benefit of the crown.

It would be idle upon such a point, to accumulate authorities. It is sufficient to say that the high court of admiralty of England, which has for many years been adorned by the most illustrious of jurists, and one of the most amiable of mankind, has been in the habit of offering bounties to piracy and temptations to licentious plunder, if my learned friend be warranted in his doctrine.

I could, if it were necessary, cite many other cases, (some of which will be found in the appendix to the



second volume of Dr. Brown's Civil and Admiralty Law,) but I hold this matter to be too clear to be gravely contested in a tribunal like this.

I assume, then, the truth of the position with which, in this branch of the argument, I commenced, and I ask with confidence, if it is to be endured, that neutrals shall assemble, on the high road of trade for the purposes of any commerce, (whether altogether their own, or partly their own and partly that of a belligerent, as would seem to be the case on this occasion,) ships fitted for warlike purposes as well as for defence, belonging to, and commanded and managed by, the subjects of a belligerent, and therefore having power, as far as it goes, and inclination without limit or control, to harm the opposite belligerent by annoying his trade, as well as by resisting his right of search? I ask if it is to be endured, that neutrals shall thus make themselves the allies of the English law of droits, an important portion of the English system of naval hostility, tremendous enough in the actual state of the world without its aid? It is with you to sanction this anomaly if you choose, and if you do sanction it, the nation must bear the consequences; but I have a firm persuasion that we shall not hastily be saddled with a doctrine so fatal in its tendency, especially as the authority of your judgment, great as it is, will not, undoubtedly will not, obtain for us a reciprocal sacrifice in any country upon earth.

[He then proceeded to consider the opposite argument, that the text writers on the law of nations, having made no exception to the general right of neutrals to carry their goods in enemy ships, this right must extend even to armed vessels.]

The learned gentlemen refer us in the first place to Bynkershoek, and Ward, and Azuni,\* and other

\* Bynk. Quæst. Jur. Pub. l. 1, c. 13. Azuni, vol. 2, p. 194, 196. (Mr. Johnson's Transl.) Vattel, Droit des Gens, l. 3, c. 7, s. 116, et seq. Grotius, de J. Bac. P. l. 3, c. 6. Ward on Contraband, p. 136.



writers upon the law of nations, who are imagined to have given opinions upon this point. These writers do certainly concur in declaring that neutrals cannot be prevented from employing the vessels of either of the belligerents for the purpose of continuing their lawful commerce; but they lend no color to the doctrine that the armed vessels of a belligerent may, by being so employed, be made the means of withdrawing the cargo from the inspection of the other belligerent, as well as of augmenting the perils to which the unarmed trade of that belligerent would otherwise be exposed. The treatises which have been referred to would be very good authorities to prove (if it were denied) that enemy ships do not necessarily make enemy goods. They go so far and no farther. The single purpose of their authors was to investigate and condemn the sweeping rule, adopted by several maritime states, and at one time approved by Grotius—“*ex navibus res prædæ subjiciuntur.*” And this purpose did not call upon them to settle, or even consider, the matter of the present discussion. The question whether a hostile flag ought of itself to infect with a hostile character the goods of a friend, may be answered in the negative, without in the least affecting the question, whether, if a hostile force be added to the flag, a neutral can advisedly hire it without responsibility for the consequences. The first question looks exclusively to the national character of a commercial vehicle; the second to a military adjunct, which in no degree contributes to constitute that character, or to form that vehicle. A ship is as much an enemy ship, and as completely a conveyance for neutral commodities, without an armament as with it. An armament makes her more than a mere commercial conveyance for the purposes of a neutral, by superinducing warlike accompaniments, and worse than such a conveyance, by introducing an incumbrance unfriendly (nautically speaking) to speed and safety. In a word, the general proposition that the character of the bottom does not

*ipso jure* fix the character of the goods, is entirely wide of a proposition which asserts the effect of hostile equipment and resistance, let the bottom be what it may; and, consequently, nothing is gained, to the prejudice of the latter proposition, by showing that jurists are agreed in favor of the former.

But it is, nevertheless, possible that we may discover, either in the terms in which these great teachers of legal wisdom have enunciated the former proposition, or, in their reasonings upon it, a sufficiently clear indication of their opinion upon the subject of our inquiry. It is, indeed, to be expected, that their language and illustrations will point to a universal conclusion, spreading itself over every variety and combination of circumstances, if such a conclusion was intended; and, on the contrary, that, if a conclusion, applicable simply to the quality and character of the owner of the vehicle employed by a neutral merchant, was in view, we shall find the phraseology which expresses it, and the illustrations which recommend it, suited to that view.

The thirteenth chapter of the first book of Bynkershoek's *Quæstiones Juris Publici*, to which we have been referred, professes to treat "*De amicorum bonis, in hostium navibus repertis*," and by the statement of a doubt ascribed to Grotius—" *an bona amicorum, in hostium navibus reperta, pro hostilibus essent habenda*," announces the question to be disposed of. This question, resting upon the single fact, that the ship in which the friendly goods are found, belongs to an enemy, obviously inquires nothing more than whether, on that account, the goods may be confiscated; and throughout the chapter it is so treated. " *Nam cur mihi non liceat uti nave amici mei, quanquam tui hostis, ad transvehendas merces meas?*" " *Quare si ejus navem operamque conduxerim, ut res meas trans mare vehat*," &c.—" *pro mercede ejus uti nave ad utilitatem meam*," &c. In all this, and in whatever else the chapter contains, there is no allusion to any thing but the mere vehicle "*ad transvehendas merces*," and to the



ownership of that vehicle. The phraseology is appropriate to define a merchant vessel in her ordinary state, with nothing to distinguish her but her enemy character. It is not adapted to convey the idea of a vessel, which has passed into a new state by the union of faculties for war, with those for transportation.

As to the reasoning, it manifestly stops at the point I have mentioned. “*Licet mihi cum hoste tuo commercia frequentare; quod si liceat, licebit quoque cum eo quoscunque contractus celebrare, emere, vendere, locare, conducere, atque ita porro.*” “*Cape quodcunque est hostis tui; sed mihi redde quod meum est, quia amicus tuus sum, et impositione rerum mearum nihil molitus sum in necem tuam.*” The general position that I have a right to trade with your enemy, and, consequently, to make contracts with him, is here found without any one of the limits which belong to it; but we know that Bynkershoek could not and did not mean to have it so understood. He was aware, and has elsewhere shown, that it was restricted by the state of war. He knew, for example, that a neutral could generally buy, sell, hire, and let to hire, from and to a belligerent; but not hire or sell to a belligerent a vessel of war, or even a passport; or contract to send him contraband, or to carry his despatches, or to supply his blockaded ports, or to disguise his goods as his own, or to send him goods to become his on their arrival, to save the risk of capture *in transitu*. We can only account for his arguing in this place, upon the general right, without noticing any modification, which war imposed upon it, by supposing that he was reasoning upon the common condition of neutral traffic, unassociated with the use of force, or with any other hostile quality, and in no situation to come in collision with any of the parties to the war. And this supposition is confirmed by the quiet assumption, (without proof,) with which the observation last quoted concludes, that by the employment of the enemy ship the neutral attempts nothing to the prejudice of the opposite belligerent. This assumption



was not unnatural, if none but an unarmed vessel was in his mind; but if his view extended to a ship provided with warlike equipment, it was rather an extraordinary postulate for so able a reasoner as Bynkershoek to assume.

The passage in the controversial treatise published by Mr. Ward in 1801, on the relative rights and duties of belligerent and neutral powers,\* which has been referred to on the other side, runs thus: "The right of an impartial neutral to continue his trade with each belligerent, so long as that trade can in no respect do injury to either, is certainly uncontested and incontestible; and it would be difficult to show the injury, or what interference there is in the war, by placing such goods as are sacred, from their neutrality, and have, therefore, a right of passage all over the world, under the care and protection of a belligerent flag. Something in point of prudence may be urged, to prevent their being exposed to the accidents of war; but if the neutral chooses to risk this, it is impossible, I think, to conceive a well-founded reason for supposing, that any confliction of rights between him and the other belligerent can arise from the procedure. This, then, seems an innocent, and, therefore, a natural right in the neutral; as such formed one of the provisions of the *consolato*, and as such was approved by Bynkershoek," &c. (Q. J. Pub. c. xiv. p. 136.) Now what is maintained in this passage is, that a neutral may trade in a belligerent vessel and under a belligerent flag, in opposition to the doctrine, that the national character of the ship ought to conclude that of the cargo—or as he elsewhere phrases it, "that all should obey the national character of the ship." The author states expressly, that the right of which he is speaking, and which only he had in his view, formed one of the provisions of the *consolato*, and was approved by Bynkershoek. What right was approved by Bynker-

\* [The title of this book is "An Essay on Contraband: being a continuation of the Treatise of the Relative Rights and Duties of Belligerent and Neutral Nations in Maritime Affairs."]

shock, we have already seen; and every body knows that the *consolato* refers only to the property of the vessel, and makes no provision for the case of a military equipment which nothing but a direct provision could sanction. Besides, the main ground upon which Mr. Ward places the right is that the goods are sacred from their neutrality. Now it is impossible that this should be known without the exercise of that right of visitation and search, to which he insists that every belligerent is entitled; and consequently he must mean that the belligerent vessel which carries the goods, said to be neutral, is not to be in a situation to contest by force the exercise of that right. Moreover, the expressions, "so long as that trade can in no respect do injury to either," show his meaning to be that it is not to be a trade, which provides resistance to the right of search, and increases the hostile means of one of the belligerents on the seas. And, again, when in his reasoning he says, that he cannot conceive how the privilege which he admits can produce "any confliction of rights" between the neutral and the opposite belligerent, it is quite impossible that he should have in his mind the case of a deliberate resistance to that very right of visitation and search which it was the great object of his treatise to uphold.

In truth, Mr. Ward is in this place contending that the principle of "free ships free goods" is not "a natural right,"—and he endeavors to prove it by showing (among other things) that the principle which is usually associated with it in treaties,—that "enemy ships shall make enemy goods," is a violation of natural right. For this purpose it was not necessary to discuss or decide the present question; and, accordingly, he does not meddle with it, unless what he says about "the accidents of war," to which neutral property is exposed in belligerent vessels should be thought to touch it.

The first passage, referred to in Azuni's book, amounts only to this—that neutrals cannot be prevented from employing the vessels of either of the



belligerents for the purpose of continuing their peace trade, unless by interfering in the war, "they depart from that perfect neutrality which they are bound to observe." It is a gratuitous supposition that this passage was meant to include vessels fitted for aggression and resistance. Nay, the supposition is worse than gratuitous. It is impliedly forbidden by the reference to the peace trade of the neutral as that which is to be authorized in the vessels alluded to, and by the exception of all cases in which the neutral interferes in the war, or in any degree deserts his neutrality.

Such a large exception goes the whole length of my doctrine, if it means any thing; and there was no necessity to make it special, unless it was presumed that common sense had left the world. It was too obvious to require any particular mention, that it was an interposition in the war and inconsistent with pure neutrality to employ a vessel equipped for battle and certain to engage in it, (to exempt the neutral from the observance of his known duties,) if it could be done with a prospect of success, and certain also to act offensively, if a suitable occasion presented itself. It was enough to lay down the wide caution against any use or employment of hostile force, which not being capable of any check, on account of the direction to which it is subject, and the disposition which belongs to it, cannot be employed without embarking in the war and taking an unneutral attitude. We are told by Ward, (vol. ii. p. 10,) in the language of Hubner, who has been called "the great champion of neutral rights," that "*Toute neutralite consiste dans une inaction entiere relativement a la guerre.*" And I know not how a neutral can be said to be wholly inactive relatively to the war, who allies himself by compact with warlike means and hostile dispositions and intentions, which, when he has once connected himself with them, he knows he cannot restrain, and to which he alone gives all the activity and all the power of mischief which they possess. It is difficult to conceive how he who has pre-



pared and hired the power of warlike combat, with a knowledge that the desire, duty and determination to combat are united with that power, can be said to be thus inactive, and especially when combat has actually followed his arrangements as their regular consequence. Self-evident propositions do not require to be set forth in detail, and the wonder is that we should expect it. On the other hand, if a neutral can do this, it is but reasonable to suppose that his right to do so would be stated with precision even by such sciolists as Azuni.

But if the exception in Azuni does not plainly exclude, (as I have no doubt it does,) from the neutral's privileges, the employment of ships equipped for battle, it does at any rate reduce all that he says as an authority on the extent of that privilege to nothing, since the phraseology, in which Azuni has defined the privilege, is at least as equivocal as the exception. An ambiguous general rule given by a feeble writer, who qualifies it by an ambiguous general exception, may afford matter for controversy, but can scarcely contribute to settle one.

Heineccius, Grotius, Hubner, Vattel, and others are quoted by Azuni, (vol. 2, p. 194, 195,) but they simply state, what doubtless Azuni meant to state, the general doctrine, (which I do not mean to dispute, although it was once disputed,) that friendly goods are not prize merely because taken in a vessel belonging to the enemy. It is impossible to make any thing like an authority, for the doctrine of the learned counsel, out of any or all of these loose *dicta*, the subject of which was, as I have already said, the effect of the flag and ownership of the vessel upon the character of the cargo.

The other passage in Azuni which the counsel refers to is no more to his purpose than that which I have examined.

“Belligerents have no right over the effects of friends and neutrals, in whatever place they may be found, though within the territory or in the vessels of ene-

mies. For this reason, when a maritime city is taken by assault, or in any other way, the belligerent cannot seize the neutral vessels found in the port, nor their cargoes, unless they are contraband of war, and unless the captains have taken up arms or voluntarily seconded the enemy in their resistance. For a stronger reason ought the goods of neutrals, found on board the ship of an enemy, to be considered as free, since it cannot be regarded as the territory of the enemy."

Now there is nothing in this passage which requires to be noticed, save only what relates to neutral vessels and cargoes found in the port of a captured city, which seems to be much confided in by the learned counsel as favorable to his case! I shall concede that the law is as Azuni states it. I only marvel that it is thought to have any bearing upon the present subject.

It cannot be doubted that a neutral who is found on a lawful errand, in a captured place on land with which he has contracted no hostile obligations of any sort, (as is supposed in the case put by Azuni,) is innocent in every view, and cannot be the lawful object of hostility: if it were otherwise, every belligerent maritime city would be in a state of constructive blockade of a perfectly new invention. The supposed position of the neutral relatively to the captured place necessarily excludes the idea of penalty. He has not given, or contributed to give to that place the military capacity which it has exerted. He did not erect, or assist in erecting its fortifications, in levying or paying its garrison, in furnishing its arms or stores. He has not hired those fortifications with their appendages, or in any way produced or increased their means of annoyance or defence. He has no connexion with the place, further than that he is in it, upon a fair and altogether neutral motive, not injurious to any body, or capable of becoming so. But suppose that, for the purposes of his trade, or for any other purpose, he had hired the fortresses, the troops, the cannon, the ammunition, the provisions, and all the means and implements of war, with which, as with a military force, he had unit-



ed himself and his concerns. Suppose that the fortifications had been erected for his accommodation, or being erected before, had become his by special covenant; that but for his views and conduct they had been impotent and harmless, or had not been there at all: suppose, in a word, that he is not only the tenant of them, but creator of all that constitutes their faculty to mischief his friends, and that he has left the command of them to those who are at public enmity with these friends, without reserving any power in himself to counteract the effects of that enmity, and that then he has placed his property and himself under their auspices! Will the learned gentleman tell us that he and his property would then be neutral in the view of those by whom the place is assailed and captured, and against whom it has used the power which he has furnished, or contributed to furnish to it? I am sure he will not. Yet this is the analogous case. The *Nereide* was a moveable fortress which the claimant brought upon the seas. She would not have been there but for him. Her armament was his armament. Her power was his power. He drew that armament and that power into conflict, or into the opportunity of conflict with the opposite belligerent, with a thorough conviction that conflict and opportunity would, and must be the same thing. From the master to the meanest sailor, every man on board fought at his cost and by his original procurement. But in the other case, it is assumed by Azuni that the neutral has nothing to do with the matter. He entered the place before it was attacked. He had the clearest right to do so. He sought no protection from the force on which it relied for its defence. He did nothing towards the organization or maintenance of that force. He made no covenant with it, or its owners. He did not employ it, or assist in its operations: and, consequently, had no more connexion with it than if he and his property had been on the opposite point of the globe. The place would not have been the less attacked if he and his property had not been in it, nor



would it have been better or worse defended. The whole transaction passes without involving or touching him in the slightest manner.

We have then, at the threshold, a wide distinction between Azuni's case and ours; but this is not all, although it is sufficient. The resistance of a city, attacked by its enemies, cannot be inconsistent with the obligations of a neutral, who finds himself there, unless he mixes in it. What right of the assailing party is that resistance calculated to violate with regard to him? Certainly none. The right of visitation and search, (the only one that can be imagined to be material in this view,) does not apply to the subject. He is, for the present, rightfully out of the reach of it; and can, in fact, do nothing to facilitate visitation and search otherwise than by taking his goods out of port to the assailant, or by co-operating with the assailant to subdue the place. The first, undoubtedly, he is not obliged to do, and probably cannot, and will not be permitted to do, even if there be time for it. The second would make him a traitor to the city which had hospitably received him. During the contention of two hostile forces, neither of which he has raised up, or fostered, or adopted, he is justified in remaining a mere spectator, and is bound to do so. The right of visitation and search, therefore, of which, indeed, the ocean is the only theatre, is not infringed on this occasion. What other right, then, is violated? I know of none: I have heard of none. But this is not so in our case, if we have succeeded, or should yet succeed, in proving that the claimant acted unlawfully, from the first preparation of his expedition to its last catastrophe; that he violated his neutral duties by employing hostile force at all; and that when this hostile force resisted the visitation and search of an American cruiser, the climax of illegality was completed.

It is said, however, that Mr. Pinto, as a merchant of Buenos Ayres, had a peculiar justification for this armament, in the danger to his property and himself, produced by the cruisers of Carthagena: that it was

the usage of this trade, and the only adequate mode of carrying it on, before the breaking out of the war between the United States and England; and that Mr. Pinto intended no resistance to United States' cruisers.

As to his intentions, I do not profess to know, with certainty, what they were, and I suppose that his counsel know as little of the matter as I do. It may be very well for them and him to say that it was not his intention that the privateers of the United States should be resisted, when they could be resisted with a prospect of success, and thus be prevented from interrupting a voyage, which promised to be so lucrative, by the capture of the vessel in which he was performing it; but I am not apprized of the proofs by which he could be judicially exculpated from such an intention, if I chose, as my learned colleague has done, to press it against him. I do not think it material, however. For let his intentions, in this particular, have been what they might, the law infers, from his conduct, all that my argument requires. Mr. Pinto set in motion upon the Atlantic a warlike force, hostile by notorious duty to the United States, a duty which he was bound to know he could not neutralize, and the effects of which he was also bound to know he could not check. Every man must be taken to intend, where intention is important, the natural and ordinary results of his own acts. The municipal law of our country, and every civilized country, proceeds upon that rule, so as always to create responsibility for those results. The particular intention does not need to be inquired into. It is enough that the result in question ought to have been foreseen. Thus, (to put a familiar case,) if a man rides a horse, accustomed to strike, into a crowd, upon an errand ever so lawful, he is liable for the mischief which ensues, whether he intended that mischief or not.

The natural consequences of Mr. Pinto's acts were, that if an American cruiser, (not of an overwhelming force,) met him in his voyage, resistance would be



made, even if he should forbid it, to the right of that cruiser to examine his property; and that, if he was met by an unarmed American vessel of sufficient value to tempt the commander of the Nereide, that vessel would be assailed. The first of these consequences has happened, and by every system of law known to mankind would be visited with penalty.

The right of Mr. Pinto to make a provision of defensive force against Carthagena cruisers cannot serve him in this cause. If he armed for limited purposes, it was for him to take care that he suited his armament to those purposes, and that its exertions were confined to them. He could not arm in such a way as to give uncontrollable power, where there already existed the desire, to exceed those purposes to the injury of those against whom he had no right to arm. If he does so arm, all that I insist is, that he does it at his peril. If his purpose is exceeded, from causes palpably inherent in the nature of the armament, and the direction under which it is placed, it cannot be unreasonable to say that he must at least answer for that surplus, if it were only upon the maxim *respondet superior*; a maxim as universal in the law of prize as any maxim can be: for although in the municipal law, it generally imports only civil responsibility, in the *jus gentium* it produces confiscation. Even in the municipal law, it is a cardinal rule *sic utere tuo ut alienum non lædas*; and this rule, applied to Mr. Pinto, would, of itself, restrict his right of arming to a mode that would be compatible with the rights of others. He who should go into the streets accompanied by a mastiff of a surly and ungovernable temper, and accustomed to bite, (I mean no slur upon any body by this homely comparison,) even although he goes upon lawful business, and makes the dog his companion, with a view to his defence against some ruffian, who has threatened him, must abide the consequences, if his associate bites those who are his master's friends, and who have, moreover, a right to stop him on his



way for the purpose of some inquiry, and who have been bitten in the attempt to exercise that right.

As to what is said of the manner of carrying on this trade before the breaking out of the war between the United States and England—is it meant to tell us that a trader continues after the breaking out of a war to have all the rights which he possessed before, merely because he is a neutral? That the war does not affect all his previous rights or habits, I admit; but it does affect them largely, nevertheless; and it affects them exactly as far as his former rights and habits would now, in their exercise and continuance, be an interference in the war. Thus before the commencement of hostilities, he could carry articles usually denominated contraband of war. After hostilities commence, he does so at the hazard of seizure and confiscation, even if his peace-traffic had been to a great extent, or altogether in such articles. And why is this so? Simply because the carrying of such articles in peace, was injurious to nobody, but upon the breaking out of the war does injury to one of the belligerents with reference to the war. And various other instances might be given of the same class. If, indeed, that which was the previous trade of a neutral, has no relation in its substance or manner of conducting it to hostility, the war does not affect it otherwise than by producing detention for inquiry and search; but when it has that relation, as it always has, when by seeking the armed ships of a belligerent it generates collisions, the war invariably affects and reduces it.

Even if it be true, therefore, of which, however, there is no proof in the cause, that British armed vessels had before been used in this trade, the moment the war broke out between the United States and England, the continuance of that practice became as completely unneutral as did the carrying of articles of contraband, and became liable to the same penal visitation. It would be idle to multiply words upon such a point.

It has further been suggested, that if Mr. Pinto had not used an armed ship of England, he could not have undertaken his voyage at all. Be it so. Although there is no evidence to countenance such an apology, I am willing, without reserve, to admit the fact, while I utterly deny the conclusion of law. We are fallen upon strange times, when every sort of absurdity—I beg my learned opponents to pardon the accidental freedom of this expression, and to believe that I respect them both too much to be willing to give umbrage to either. To one of them, indeed, I have heretofore given unintentional pain, by observations to which the influence of accidental excitement imparted the appearance of unkind criticism.\* The manner in which he replied to those observations, reproached me by its forbearance and urbanity, and could not fail to hasten the repentance which reflection alone would have produced, and which I am glad to have so public an occasion of avowing. I offer him a gratuitous and cheerful atonement—cheerful, because it puts me to rights with myself, and because it is tendered not to ignorance and presumption, but to the highest worth in intellect and morals, enhanced by such eloquence as few may hope to equal—to an interesting stranger whom adversity has tried, and affliction struck severely to the heart—to an exile whom any country might be proud to receive, and every man of a generous temper, would be ashamed to offend. I feel relieved by this atonement, and proceed with more alacrity. I say that it is passing strange, that, in the nineteenth century, we should have it insinuated, that the provisions of public law, or of any law, are to bend before the private convenience of an individual trader. The law of nations did not compel Mr. Pinto to trade. It allowed him to do so, if he could with innocence. It did not convert his rights into obligations: it left

\* [In the case of the *Mary*, argued at the same term, in which Mr. Emmet (of counsel for the captors,) spoke, as Mr. Pinkney supposed, a little too harshly of one of the claimants.]



them as it found them, except only that it impressed upon them, with a view to the state of war which had supervened the conditions and qualifications annexed to his predicament as a neutral. If he could safely and advantageously trade in this new state of his rights, it was well; if not, it was either his duty to forbear to trade at all, or to make up his mind to defy the consequences. And is this such a harsh alternative? Is it not the dilemma to which God and the laws have reduced us all—and some of us more emphatically than others? Is not the vocation of every man in society more or less limited by positive institution, and does not the law of nations deal with, what I may call, a benignant profusion in such limitations? War brings to a neutral its benefits and its disadvantages. For its benefits, he is indebted to the lamentable discord and misery of his fellow-creatures, and he should, therefore, bear, not merely with a philosophic but with a Christian patience, the evils with which these benefits are alloyed. It is fortunate for the world that they are so alloyed, and heaven forbid that the time should ever arrive, when one portion of the human race should feel too deep an interest in perpetuating the destructive quarrels of their brethren.

But is there any thing new or peculiar in this alternative? What is the predicament of a neutral merchant domiciled before the war in one of the belligerent countries? Is he not called upon by the law of prize to cease to trade, or to trade upon belligerent responsibility? Does not that law tell him, “abandon your commerce, although it was begun in peace, and perhaps established by great sacrifices, prepare to find it treated as the commerce of the belligerent with whom you have identified yourself?” Does it not announce the same sentence to the dealer in articles of contraband; to the trader with ports which the belligerent chooses to blockade; to the ship-owner who has transport vessels to let to foreign governments? In those cases, it does not say, you shall not trade, or hire your ships as you were used to do; but merely,



that if you do, and are captured, your property shall be forfeited, as if it were the property of enemies. I ask, if the man, who lives with innocence, in peace, upon the profits of carrying contraband articles, is less oppressed by the alternative which is presented to his choice, than Mr. Pinto by that which I hold was tendered to him, if his situation be truly stated, not exaggerated by his counsel? I ask if his situation was worse than that of any other neutral, whose ordinary peace-traffic is reduced or annihilated by the mighty instrumentality of war?

But it is said that the resistance, which was made, was a rightful resistance on the part of the commander of the Nereide, by whom it was made in fact. It was so. And can Mr. Pinto take refuge behind the peculiar rights of his associates, without sharing the legal effects of their defeat? Nothing could be more intolerable than such a doctrine. A belligerent has a right to break a blockade if he can. But can a neutral, therefore, put himself under the shade of that right, and in case the belligerent master should make the attempt and succeed, take the profit, and if he fails, claim immunity from confiscation by an ingenious reinforcement of his own rights with those of the belligerent master? Or, if the conduct of the belligerent master shall be thought to be insufficient to impute to the owner of the cargo the *mens rea* in the case of blockade, by a sweeping presumption that the vessel is going into the blockaded port in the service of the cargo only—what shall we say to the case of contraband, which must be put on board by the owner, with a knowledge that it will be exposed to the peril of capture, and if captured, to the certainty of confiscation? A belligerent master has a right to carry contraband if he can; and only superior force can prevent him. But, surely, a neutral cannot so avail himself of that right, as to ship in safety contraband articles in a belligerent vessel. If he could, he would have a larger and more effectual right than that under which he takes shelter; for the belligerent's right is subject to

be defeated by force, and so much of his property as is engaged in the enterprise becomes prize of war, if he is conquered. Just as in this case, his right of resistance is met on the other side by a right to attack and seize as prize, and every thing depends upon the issue of the combat. It is, indeed, self-evident, that a neutral, who is driven to rely upon the rights of war, vested in others, not himself, leans upon a broken reed, if those rights fail of being successfully maintained against the opposite party to the war; and sure I am, that no case can be imagined, in which a neutral can cover himself with the right of a belligerent, whom he chooses to employ, and thus claim the combined advantages of a belligerent and a neutral character. If he can advance such a claim, the cases of domicil have all been adjudged upon false principles, for they expressly affirm the contrary, and stand upon no other reason.

But the true light, in which to view this point, is, that the right of resistance, vested in the belligerent master, is precisely that which aggravates, instead of taking away, the guilt of the neutral charterer; or, in other words, is exactly the consideration which ought to make the resistance his own, in the eye of the law, and, consequently, to render him and his property liable to share the fate of the belligerent master and vessel.

It is indisputable that if Mr. Pinto, instead of chartering the *Nereide*, had hired a neutral ship, and the neutral master, without his concurrence, had resisted visitation and search, the goods of Pinto would have been prize as well as the neutral vessel. We have for this the express authority of sir William Scott, in the celebrated case of the *Swedish convoy* and others.\* “The penalty for the violent contravention of this right, is the confiscation of the property” (cargo as

\* The *Maria*, Rob. Adm. Rep. vol. 1, p. 287. The *Elsebe*, Rob. Adm. Rep. vol. 5, p. 174. The *Catharina Elizabeth*, ib. 232. The *Despatch*, Rob. Adm. Rep. 280.



well as vessel,) “so withheld from visitation and search.”

Upon what ground is the cargo forfeited in that case? Upon the ground that the master's resistance withholds the cargo from visitation and search, and that the owner of it is answerable for the master's conduct in that respect, although the master is not, strictly speaking, the agent of the cargo, and the owner of the cargo is not generally affected by his acts in the view of a court of prize. The extension of the penalty of confiscation to all the property, withheld by the resistance of the neutral master from visitation and search, whether it belongs to the owner of the vessel or not, proceeds, undoubtedly, from the importance attached to the right with which such resistance interferes—to a right without which all the other belligerent rights, with which the law of prize is concerned, are mere shadows. The owner of a neutral cargo, forfeited by the resistance of the master of a neutral ship, would seem to have some show of reason for his complaint against the rigor of such an indiscriminate punishment of the innocent and the guilty. He might urge with great plausibility, that as he had not partaken in any manner the resistance, as he not only did not command, but did not wish it, as he was justified when he shipped his goods, in relying upon the presumption that a neutral master would fulfil his neutral duties, and would not have recourse to hostile resistance to the right of visiting and searching his vessel and those goods, he ought not to be made accountable for that resistance. But with what plausibility can the charterer of a belligerent vessel, which has by resistance withheld his property from visitation and search, claim to be exempted from the utmost severity of the rule? When he chartered such a vessel and shipped his goods, had he any ground for presuming that the belligerent master would forbear resistance to an enemy cruiser? Did he not, on the contrary, know that he would resist, and that it would be out of his power to prevent him? Did he not go to sea with an absolute assurance



that his goods would be withheld from the visitation and search of the opposite belligerent by all the resistance that could be made? Nay, further; is not the neutral owner of the goods interested that resistance should be made, even with reference to the vessel, when it can be made effectually; since, if the vessel be seized as prize, the voyage is broken up, and the hopes of profit, which depended upon it, utterly blasted? Such was Mr. Pinto's predicament; and it will not be believed that he would see, with disapprobation, the repulse of a cruiser of this country attempting to capture the *Nereide*, and to carry her anywhere but to Buenos Ayres.

With regard to a neutral, therefore, who charters an armed belligerent vessel, the penalty of confiscation for resistance by that vessel is unimpeachably just. If it is established that a neutral should be responsible for the resistance of the master of a neutral vessel, which he could not foresee, had no reason to expect, and no interest to produce, can it be unfit that he should be responsible for the regular and foreseen resistance of the master of an armed belligerent vessel chartered by him, which resistance he could not help foreseeing, which, if he did not direct, he must have confidently expected, and which his interest required should be made as often as it happened to be practicable? It would be intolerable that he, who has done every thing which, by all reasonable calculation, would subject his property to the full exercise of the right of visitation and search, shall be punished with confiscation for the disappointment of that calculation, and that he who has done every thing which was adapted to defeat that right, and who has spontaneously given himself an interest in defeating it, should be rewarded with restitution; or, to speak more correctly, by a concession of all the benefits of successful resistance, and by an exemption from all its penal consequences in case of failure.

I stand upon all just principles of law and reason; therefore, when I say, that the known right and incli-

nation of the master of the Nereide, combined with his capacity, obtained at Pinto's expense, to resist a cruiser of the United States, is so far from being a foundation on which to build his innocence, that it is the clearest and most conclusive inducement to consider his property as prize. If one were called upon to select a case, in which the confiscation of the cargo of a resisting vessel was not only lawful, but equitable, it would be a case in which a neutral, abusing the indulgence extended to him by the modern law of nations, to employ a belligerent vehicle, employs just such a vehicle as under belligerent command and conduct will inevitably be made to withdraw his property from examination, so far as its physical force can so withdraw it. And certainly a greater anomaly can scarcely be conceived, than that I shall answer for the hostile conduct of him, upon whose neutral and peaceful conduct I was warranted, when I employed him, to rely; and yet shall not answer for the hostile conduct of him, from whom I was warranted, when I employed him, in anticipating nothing but hostility and violence!

[Mr. Pinkney then examined the case of the Swedish convoy in 1798, and insisted that there was no difference between a ship sailing under protection of a resisting convoy and goods found in a resisting ship; that it was admitted both by the counsel for the claimant and by the court, in that case, that the distinction between an enemy convoy and a neutral convoy was unfavorable to the former, inasmuch as the enemy convoy stamped a primary character of hostility on all the vessels sailing under its protection, which presumption the counsel seemed to think might be rebutted, but which sir William Scott considered to be a conclusive presumption; and that the distinction between hostile and neutral convoy, favorable to the latter, was, that where the convoying force was neutral, the captors must show an actual resistance, which in the case of the *Maria* was shown, among other things, by the instructions of the Swedish government, authorizing

such resistance, which were relied upon, not as constituting a part of the offence, but as rendering it probable that there was actual resistance, whilst in the case of the Nereide, the intention to resist, independent of the fact, was rendered certain by the general hostile character of the force employed.]

The case of the Catharina Elizabeth, (Rob. Adm. Rep. vol. 5, p. 232,) has also been produced against us. It would seem, indeed, that my learned friend entertains some doubts of its applicability to that of the Nereide, since he rather invites our attention to the brief marginal summary of the reporter than to the case. The marginal note says: "Resistance by an enemy master will not affect the cargo, being the property of a neutral merchant;" and my learned friend, taking or rather mistaking this for a universal position, is so well satisfied with it that he desires to look no further, and would have us trouble ourselves as little as possible with the reasoning of the court and the particular circumstances of the transaction, by which the reporter, certainly a very excellent and able man, took for granted that his note would be qualified. Dr. Robinson meant only to say, that the resistance of the enemy master, on that occasion, did not affect the neutral cargo; presuming that the reader of his note would read the judgment to which it belonged, and in which he could not fail to find the nature of that occasion. This is what I have done, and what I trust your Honors will do. "*Territus insisto prioris margine ripæ*,"\* may come with a good grace from the learned counsel whose interest it is to take refuge there from the doctrine of the case itself; but it does not suit me. I shall, on the contrary, pass to the case from the margin.

Now what is that case? An enemy master endeavors to recover his captured property, or rather, as ap-

\* *Territaque insisto prioris margine ripæ*.

OVID, Lib. v. Fab. ix. l. 597.



pears to have been the fact, to take the captured vessel; and sir William Scott informs us that there is no harm in this, as regards the enemy master himself, and that it is quite clear that it cannot affect the neutral owner of the cargo. As to the enemy master, the quotation from Terence, "*Lupum auribus teneo*," explains the whole matter. If I capture an enemy I must take care to hold him. He is not bound, unless under parole, to acquiesce; and, if when opportunity offers he tries to withdraw himself and his property, or even to capture the captors, he does just what might be expected and what he has a right to do. He violates no duty, and infringes no obligation. I admit all this to be perfectly true; and I am ready to admit, if it will be of any service to the claimant, that the captain of the Nereide had a right, not only to resist the Governor Tompkins, but to capture her if he could. What I object against the claimant is, not that the captain of the Nereide resisted unlawfully, with a view to his own rights, but that the claimant, whose property was liable to unresisted visitation and search, and whose rights and obligations were very different from those of the captain of the Nereide, had identified himself with him, and was a party to that resistance, inasmuch as he was the hirer of the force with which it was made, knowing its hostile character, and had associated it upon the ocean with his property, aware of the hostile control to which it was subject. For a force, thus qualified, and so employed by a neutral, I say that he is responsible upon the plainest grounds of law and reason, if it be used, (as from its nature it must be,) in a way in which he is not authorized to use it. I say, further, that a neutral cannot at all employ such a force, placed under such hostile control, without guilt; and that he incurs the confiscation of his goods if they are found connected with it, although there be no resistance on account of its being hopeless. I say, further, that if a neutral will have resort to force, it must at his peril be such as is not from its character hurtful to the opposite belligerent, or incon-

sistent with a peaceable compliance on his part with all his neutral duties. And, surely, there is nothing in the case of the *Catharina Elizabeth* which says otherwise.

Another case in the same collection, (vol. 3, p. 278. *The Despatch*,) tells us that if a neutral master endeavors to rescue or recover by force the captured property, it shall be condemned, because the captor is not bound as against a neutral to keep military possession of the thing captured, or justified in holding the neutral master and crew as prisoners. On the contrary, he is to rely upon the duty of the neutral to submit, and hope for restitution and compensation from a court of prize; and if this duty be violated by the neutral master and crew, confiscation is the result. This is explanatory of the judgment in the case of the *Catharina Elizabeth*, and is there used by sir William Scott for that purpose. It shows, as the facts of the case also show, that the court intended to confine its decision in the *Catharina Elizabeth* to the case of an enemy master already captured, for whom, as he is in the custody of the captor, whose business it is, not to trust, but to guard and keep him, the neutral shipper is no longer answerable. That the enemy master ceases the moment he becomes a prisoner, and his vessel prize, to be, for any purpose, the agent, or in any sense the associate of the neutral owner of the cargo, and that their connexion is utterly dissolved by the seizure, is perfectly clear. It would, therefore, be monstrous to fasten upon the neutral owner of the goods a continuing suretiship for the peaceful conduct of the enemy master, after he has passed into the state of a prisoner of war.

But in the consideration of the case of the *Catharina Elizabeth*, it must, in an especial manner, be borne in mind, that the French vessel was not armed at all, and of course not by or for the owner of the cargo; that she did not resist visitation, search or seizure; that the single circumstance upon which condemnation of the American cargo was urged, was some hos-



tile attempt of the enemy master after capture consummated—which attempt was really and constructively his own personal act, not procured, or facilitated, or influenced, directly or indirectly, remotely or immediately, by the owner of the cargo, to whom in law he had become a stranger. Who is it that can persuade himself that there is any resemblance between that case and the present, or that, if in that case there was supposed to be an arguable reason, (if I may be allowed that expression,) for visiting upon the neutral shipper the hostile conduct of the enemy master, the same tribunal would, in our case, have hesitated to condemn?

Observe the contrast between the two cases.

In our case, at the epoch of the resistance, the relation was subsisting in its full extent between him who made that resistance, and him who provides the means without providing any check upon the use of those means; in the other case, it was extinguished. In our case, the force employed was the original force, hired by the owner of the cargo, and left by him to the direction of a hostile agent, who used it, as he could not but be sure he would, hostilely; in the other case, there was no original force; and that which was used was the personal force of the enemy master, and not that of the vessel. In our case, the force was exerted in direct opposition to the neutral's obligation of submission with reference to the cargo; and in the other, the neutral had already submitted, and his goods were in the quiet possession of the captors. In our case, a general capacity, legal and actual, of annoyance, as well as of resistance, had been given, by or for the neutral, to the vessel as a belligerent vessel, (a capacity which she preserved during her voyage,) for which alone, independently of resistance in fact, the neutral is, as I confidently contend, liable to the penalty of confiscation; in the other, the vessel was an ordinary, unarmed commercial vehicle, which the neutral



might hire and employ with perfect innocence and safety.

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The little strength, with which I set out, is at last exhausted, and I must hasten to a conclusion. I commit to you, therefore, without further discussion, the cause of my clients, identified with the rights of the American people, and with those wholesome rules which give to public law simplicity and system, and tend to the quiet of the world.

We are now, thank God, once more at peace. Our belligerent rights may, therefore, sleep for a season. May their repose be long and profound! But the time must arrive, when the interests and honor of this great nation will command them to awake, and when it does arrive, I feel undoubting confidence that they will rise from their slumber in the fulness of their strength and majesty, unenfeebled and unimpaired by the judgment of this high court.

The skill and valor of our infant navy, which has illuminated every sea, and dazzled the master states of Europe by the splendor of its triumphs, have given us a pledge, which, I trust, will continue to be dear to every American heart, and influence the future course of our policy, that the ocean is destined to acknowledge the youthful dominion of the West. I am not likely to live to see it, and, therefore, the more do I seize upon the enjoyment presented by the glorious anticipation. That this dominion, when God shall suffer us to wrest it from those who have abused it, will be exercised with such justice and moderation as will put to shame the maritime tyranny of recent times, and fix upon our power the affections of mankind it is the duty of us all to hope; but it is equally our duty to hope that we shall not be so inordinately just to others as to be unjust to ourselves.

# SPEECH OF DANIEL WEBSTER,

IN THE IMPEACHMENT OF

JAMES PRESCOTT,

JUDGE OF THE PROBATE OF WILLS, &c. FOR THE COUNTY OF MIDDLESEX, FOR MISCONDUCT AND MALADMINISTRATION IN OFFICE; BEFORE THE SENATE OF MASSACHUSETTS, 1821.\*



Mr. Webster for the respondent.

MR. PRESIDENT,

I AGREE with the honorable managers, in the importance which they have attributed to this proceeding. They have, I think, not at all overrated that importance, nor ascribed to the occasion, a solemnity which does not belong to it. Perhaps, however, I differ from them, in regard to the causes which give interest and importance to this trial, and to the parties likely to be most lastingly and deeply affected by its

\* The articles of impeachment against judge Prescott, embraced the following charges :

That he had held courts, for the transaction of Probate business, at times and places other than those authorized by law ;

That he had taken illegal fees of office ;

That he had acted as counsel and received fees in cases pending in his own court, before himself, as judge.

The twelfth article was as follows :

That " he, in June, 1815, at Framingham, in said county of Middlesex, one Alpheus Ware, who before had been, and then was guardian of one Jotham Breck, a person *non compos mentis*, being about to present his account of his guardianship of his said ward for allowance, and thereupon a controversy having arisen between the said Ware and one Nathan Grout, who, as one of the overseers of the poor of the town, in which said Breck had his settlement, attended said court to examine said accounts, respecting some property belonging to the ward of said Ware, and thereupon the

progress and result. The respondent has as deep a stake, no doubt, in this trial, as he can well have in any thing which does not affect life. Regard for reputation, love of honorable character, affection for those who must suffer with him, if he suffers, and who will feel your sentence of conviction, if you should pronounce one, fall on their own heads, as it falls on his, cannot but excite, in his breast, an anxiety, which nothing could well increase, and nothing but a consciousness of upright intention could enable him to endure.

said Prescott, overhearing the conversation between the said Ware and the said Grout, respecting said ward's estate, proposed to advise and instruct them therein ; and thereupon the said Prescott, being then and there judge as aforesaid, did advise with and direct the said Ware and Grout, concerning the settlement of the account aforesaid, and the interest and estate of the said ward, and the guardianship of the aforesaid Ware, and the said account thereafter, on the day aforesaid, was sworn to by the said Ware, and was examined, and, with the consent of said Grout, was allowed by the said judge ; and the said Prescott then and there first demanded of said Grout, as fees for advice and counsel as aforesaid, the sum of five dollars, and upon the refusal of said Grout to pay the same, the said Prescott demanded the same of the said Ware ; and the said Ware objecting to the payment thereof, the said Prescott then and there proposed to the said Ware, that if he would pay the said sum of five dollars, he would, in his said office of judge, insert and allow the same to the said Ware, in his said account of guardianship, then before sworn to, and with the consent of said Grout, allowed by the said judge. And the said Ware then and there still objecting thereto, because the said account, as allowed, had been consented to by the aforesaid Grout, acting as overseer to the poor as aforesaid ; the said Prescott insisted on the payment thereof, and to overcome the objection of said Ware thereto, stated to the said Ware, that ' the overseers of the poor need know nothing about it.' And the said Ware then and there, upon the urgent and repeated demands of the said Prescott, and upon his proposition to insert the same charge in the guardianship account aforesaid, and to allow the same without the knowledge of the said Grout, did pay to the said Prescott the said sum of five dollars. And thereupon the said Prescott did insert, by interlineation, a charge of five dollars, for the money so paid to him as aforesaid, in the guardianship account of said Ware, and did pay and allow the same accordingly."

Mr. Webster's observations on this article, together with the exordium and peroration of his speech, are inserted.—COMPILER.



Yet, sir, a few years will carry him far beyond the reach of the consequences of this trial. Those same years will bear away, also, in their rapid flight, those who prosecute and those who judge him. But the community remains. The commonwealth, we trust, will be perpetual. She is yet in her youth, as a free and independent state, and, by analogy to the life of individuals, may be said to be in that period of her existence, when principles of action are adopted, and characters formed. The honorable respondent will not be the principal sufferer, if he should here fall a victim to charges of undefined and undefinable offences, to loose notions of constitutional law, or novel rules of evidence. By the necessary retribution of things, the evil of such a course would fall most heavily on the state which should pursue it, by shaking its character for justice, and impairing its principles of constitutional liberty. This, sir, is the first interesting and important impeachment which has arisen under the constitution of the commonwealth. The decision now to be made cannot but affect subsequent cases. Governments necessarily are more or less regardful of precedents, on interesting public trials, and, as on the present occasion, all who act any part here have naturally considered what has been done, and what rules and principles have governed, in similar cases, in other communities, so those who shall come after us will look back to this trial. And I most devoutly hope they may be able to regard it as a safe and useful example, fit to instruct and guide them in their own duty; an example full of wisdom and of moderation; an example of cautious and temperate justice; an example of law and principle successfully opposed to temporary excitement; an example, indicating in all those who bear a leading part in the proceedings, a spirit, fitted for a judicial trial, and proper for men who act with an enlightened and firm regard to the permanent interests of public constitutional liberty. To preserve the respondent in the office which he fills, may

be an object of little interest to the public; and to deprive him of that office may be of as little. But on what principles he is either to be preserved or deprived, is an inquiry, in the highest degree important, and in which the public has a deep and lasting interest.

The provision, which the constitutions of this and other states have made for trying impeachments before the senate, is obviously adopted from an analogy to the English constitution. It was perceived, however, and could hardly fail to be perceived, that the resemblance was not strong, between the tribunals, clothed with the power of trying impeachments, in this country, and the English house of lords. This last is not only a branch of the legislature, but a standing judicature. It has jurisdiction to revise the judgments of all other courts. It is accustomed to the daily exercise of judicial power, and has acquired the habit and character which such exercise confers. There is a presumption, therefore, that it will try impeachments, as it tries other causes, and that the common rules of evidence, and the forms of proceedings, so essential to the rights of the accused, which prevail in other cases, will prevail also in cases of impeachment. In the construction of our American governments, it is obvious, that, although the power of judging on impeachments could probably be nowhere so well deposited, as with the senate, yet it could not but be foreseen, that this high act of judicature was to be trusted to the hands of those who did not ordinarily perform judicial functions; but who occasionally only, and on such occasions, moreover, as were generally likely to be attended with some excitement, took upon themselves the duty of judges. It must, nevertheless, be confessed, that few evils have been, as yet, found to result from this arrangement. In all the states, in the aggregate, although there have been several impeachments, there have been fewer convictions, and fewer still, in which there is just reason to



suppose injustice has taken place. From the experience of the past, I trust we may form favorable anticipations of the future, and that the judgment which this court shall now pronounce, and the rules and principles which shall guide that judgment, will be such as shall secure to the community a rigorous and unrelenting censorship over maladministration in office, and to individuals entire protection against prejudice, excitement and injustice.

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It is the twelfth, of these articles, sir, on which the learned mangers seem most confidently to rely. Whatever becomes of the rest of the case, here at least, there is thought to be a tenable ground; here is one verdant spot, where impeachment can flourish; a sort of Oasis, smiling amid the general desolation, which the law and the evidence have spread round the residue of this accusation.

I confess, sir, that I approach to the consideration of this article, not without some apprehension. But that apprehension arises from nothing in the real nature of the charge, or in the evidence by which it is supported. My apprehension and alarm arise from this; that in a criminal trial, on a most solemn and important occasion, so much weight should be given to mere coloring and declamation, under the form of a criminal accusation. In my judgment, sir, there is serious cause of alarm, when in a court of this character, accusations are brought forward, so exceedingly loose and indefinite, and arguments are urged in support of them, so little resembling what we are accustomed to hear in the ordinary courts of criminal jurisdiction.

The offence, in this article, whatever it be, instead of being charged and stated in ordinary legal language, is thrown into the form of a narrative. A story, taken from the mouth of a heated, angry and now contradicted witness, is written down at large, with every imaginable circumstance of aggravation, likely to strike undistinguishing minds; and this story, thus told, is the



very form in which the article is brought. Here we have, in the article itself, a narrative of all the evidence; we have a dialogue between the parties, are favored so far as to be shown, by marks of quotation, what sentiments and sentences belong to the respective parties in that dialogue. All convenient epithets, and expletives are inserted in this dialogue. We find the "urgent and repeated" demand of the respondent for fees. We perceive also, that he is made to lead the conversation, on all occasions. He proposed to advise and instruct; he proposed to allow the sum in the account; and it was, again, on his proposition so to insert it, that it was paid. He is represented as wanting in manners, and decorum, as well as in official integrity. It is said he overheard a conversation; and that therefore he prepared to give his advice before it was asked. In short, sir, this article contains whatever is most likely to cause the respondent to be convicted, before he is heard. I do most solemnly protest against this mode of bringing forward criminal charges. I put it to the feeling of every honorable man, whether he does not instinctively revolt from such a proceeding? In a government so much under the dominion of public opinion, and in a case in which public feeling is so easily excited, I appeal to every man of an honorable and independent mind, whether it be not the height of injustice to send forth charges against a public officer, accompanied with all these circumstances of aggravation and exasperation? Here the evidence, as yet altogether *ex parte*, the story told by a willing, if not a prejudiced witness, goes forth with the charge, embodied in the charge itself, without any distinction whatever between what is meant to be charged, as an offence, and the evidence which is to support the charge. For my own part, sir, I can conceive of nothing more unjust. Would it be tolerated for one moment in a court of law, I beg to ask, that a prosecutor departing from all the usual forms of accusation, should tell his own story, in his own way, mix up his evidence with his charges, and his own inferences with his evidence, so that the ac-

cusation, the evidence and the argument, should all go together? A judge would well deserve impeachment and conviction who should suffer such an indictment to proceed.

In this case, the whole matter might have been stated in five lines. It is simply this, and nothing more, viz.; that the respondent wishing, as an attorney, to obtain certain fees from a guardian, promised, if they were paid, to allow them in the guardianship account, as judge; and being paid he did so allow them. This is the whole substance and essence of the charge.

Notwithstanding our entire confidence in this court, we cannot but know that the respondent comes to his trial on this article under the greatest disadvantages. There is not a member of the court, nor a reading man in the community, who has not read this charge, and thereby seen at once the accusation, and the evidence, which was to support it. The whole story is told, with all the minute circumstances, and no ground is left, for the reservation of opinion, or whereupon charity itself can withhold its condemnation. Far be it from me, sir, to impute this to design. I know not the cause; but so far as the respondent is concerned, I know it had been just as fair and favorable to him, that the original *ex parte* affidavit, upon which the article was founded, should have been headed as No. 12, and inserted among the articles of impeachment. This, sir, is the true ground of the alarm which I feel, in regard to this charge; an alarm, I confess, not diminished by perceiving that this article is so great a favorite with the learned managers; for when obliged to give up one and another of their accusations, they have asked us, with an air of confidence and exultation, whether we expect them to give up the twelfth article also.

I will now, sir, with your permission proceed to consider whether this article states any legal offence. Stripped of every thing but what is material, it appears to me to amount to no more than this; viz. First,



that the respondent gave professional advice to a guardian, about the concerns of his ward, and received fees for it. Second, that he allowed those fees in the guardianship account. If this be the substance of the article, then the question follows the division which I have mentioned, and is, first, whether he had a right to give such advice, and to be paid for it; and, second, whether he had a right to allow the sum so paid in the guardian's account. I think these are the only questions to be considered. It cannot be material, certainly, whether Ware, the guardian, paid the fee willingly or unwillingly. The fact is true, that the respondent received it. If he had no right to it, then he must take the consequences; if he had a right to it, then there was nothing wrong but Ware's want of promptitude in paying it. Nor is it of any importance, supposing him to be right in allowing this fee in the guardian's account, whether he interlined the charge, in an account already drawn out, or had the account drawn over, that it might be inserted. Here again, we find a circumstance of no moment in itself, put forth to be prominent and striking, in this charge, and likely to produce an effect. It is said the sum was allowed by interlineation; as if the respondent had committed one crime to hide another, and had been guilty of forgery, to cover up extortion. Sir, not only for the sake of the respondent, but for the sake of all justice, and in behalf of all impartiality and candor, I cannot too often or too earnestly express my extreme regret, at the manner of this charge. On a paper not yet finished and recorded, what harm to make an alteration, if it be of a thing in itself proper to be done? Is it not done every day, in every court? Not only affidavits, processes, &c. but also minutes, decrees and judgments of the court, before they are recorded, are constantly altered by interlineation, by the court itself, or its order. The paper was in this case before the judge. It had not been recorded. If any new claim had then been produced, fit to be allowed, it was proper to allow it, and



certainly not criminal to insert the allowance by interlineation.

If, Sir, the substance of every thing done by the respondent in this case was lawful, then there never can justly be a criminal conviction, founded on the mere manner of doing it; even though the manner were believed to be as improper and indecorous as Ware would represent it. There is therefore no real inquiry, in this case, as I can perceive, but whether the respondent had a right to give advice, and to be paid for it; and whether he had a right to allow it in the account.

And, in the first place, sir, had the respondent a right to give professional advice to this guardian, respecting the estate of his ward?

It has frequently, perhaps as often as otherwise happened, that judges of probate have been practising lawyers. The statute book shows, that it has all along been supposed that this might be the case. There are acts, which declare that, in particular specified cases, such as appeals from their own judgments, they shall not act as counsel; implying of course that in other cases, they are expected so to act, if they see fit. Until the law of 1818, there was nothing to prevent them from being counsel for executors, administrators and guardians, as well as any other clients. My colleague, who first addressed the court, has fully explained the history and state of the law in this particular. There being then no positive prohibition, is there any thing in the nature of the case, that prevents, or should prevent, in all cases, a judge of probate from rendering professional assistance to executors, administrators or guardians? I say in all cases, and supposing no fraudulent or collusive intention. The legislature has now passed a law on this subject, which is perhaps very well, as a general rule, and now, of course, binding in all cases. But before the passing of this law, it can hardly be contended, that in no case could a judge of probate give professional advice to persons of this character. I admit, most undoubtedly, sir, that if a case

of collusion, or fraud were proved, it would deserve impeachment. If the judge and the guardian conspired to cheat the ward, a criminal conviction would be the just reward for both. They might go into utter disgrace together, and nobody would inquire which was the unjust judge, and which the fraudulent guardian; "which was the justice, which was the thief." But in a case of fair and honest character, where the guardian needed professional advice, and the judge was competent to give it, I see no legal objection. No doubt a man of caution and delicacy would generally be unwilling to render professional services, upon the value of which he might be afterwards called upon officially to form an opinion. He would not choose to be under the necessity of judging upon his own claim. Still there would seem to be no legal incompatibility. He must take care only to judge right. In various other cases, judges of probate are or may be called on to make allowances for monies paid to themselves. It is so in all cases of official fees. It might be so, also, in the case of a private debt due from the estate of a ward to a judge of probate. If, in this very case, there had been a previous debt due from Ware's ward to the respondent, might he not have asked Ware to pay it? Nay, might he not have "demanded" it; might he not even have ventured to make an "urgent and repeated request," for it? And if he had been so fortunate as to obtain it, might he not have allowed it in Ware's guardianship account?" And although he had been presumptuous enough to insert it by interlineation, among other articles in the account, before it was finally allowed and passed, instead of drawing off a new account, would even this have been regarded as flagrant injustice, or high enormity? Now I maintain, sir, that the respondent had in this case a right to give professional advice; and a right to be paid for it; and, until paid, his claim was a debt, due him from the ward's estate, which he might treat like any other debt. He might receive it, as a debt, and then as a debt paid, allow it in the guardian's account.



As before observed, the first question is, whether he could rightfully give this advice. It was certainly a case in which it was proper for the guardian to take legal advice of somebody. The occasion called for it, and we find the estate to have been essentially benefited by it. It is among the clearest duties of those who act in situations of trust, to take legal advice, whenever it is necessary. If they do not, and loss ensues, they themselves, and not those whom they represent, must bear that loss. There can be no clearer ground, on which to make executors, administrators and guardians personally liable for losses which happen to estates under their care, than negligence in not obtaining legal advice, when necessary and proper. If, instead of giving this fee to the respondent, the guardian had given it to any other professional man, would any body have thought it improper? I presume no one would. Then, what was there, in the respondent's situation, which rendered it improper for him to give the advice? It concerned no matter that could come before him. It was wholly independent of any proceeding arisen, or that could arise, in his court. It interfered in no way with his judicial duty, any more than it would have done to have given the same advice to the ward himself, before the guardianship. He had then as good right to give this advice to the guardian, as he would have had to have given it to the ward.

And, sir, in the second place, I think it plain, that if he had a right to give the advice, and to be paid for it, he had not only the right but was bound to allow it in the guardian's account. This article is attempted to be supported altogether by accumulating circumstances, no one of which bears resemblance to any thing like a legal offence. Is the respondent to be convicted for having given the advice? "No," it is said, "not that alone, but he demanded a fee for it." Is he to be convicted then, for giving advice, and for demanding a fee for it, it not being denied that it was a fit occasion for somebody's advice? "No, not convicted for that alone, but he insisted on a fee, and was



urgent, and pressing for it." If he had a right to the fee, might he not insist upon it, and be urgent for it, till he got it, without a violation of law? "But then he promised to allow it in the guardian's account, and obtained it by means of this promise, and did afterwards allow it." But if it ought to be paid, and the guardian paid it, ought it not to be allowed in his account, and could it be improper for the respondent to say he should so allow it, and actually so to allow it? "But did he not allow it by interlineation?" What sort of interlineation? The account was before him, unrecorded: this came forward, as a new charge; and for convenience and to save labor, it was inserted among other charges, without a new draft; and this is all the interlineation there is in the case.

I now ask you, sir—I put it to every member of this court, upon his oath and his conscience, to say on which of these circumstances the guilt attaches? Where is the crime? If this charge had been carried to the account without interlineation, would the respondent have been guiltless? If not, then the interlineation does not constitute his guilt. If the fee had been paid to some one else, and then allowed, in the same manner it was allowed, would the respondent have been guiltless? If so, then the crime is not in the manner of allowing the charge. If the guardian had urged and pressed for the respondent's advice, and in receiving it had paid for it willingly and cheerfully, and it had been properly allowed in the account, would the respondent then have been guiltless? If so, then his mere giving advice, and taking fees for it, of a guardian, does not constitute his crime. In this manner, sir, this article may be analyzed, and it will be found that no one part of it contains the criminal matter—and, if there be crime in no one part, there can be no crime in the whole. It is not a case of right acts done with wrong motives, which sometimes may show misconduct, all taken together, although each circumstance may be of itself indifferent. Here is official corruption complained of. We ask, in what

it consists? We demand to know the legal offence which has been committed. A narrative is rehearsed to us, and we are told that the result of that must be conviction; but on what legal grounds, or for what describable legal reason, I am yet at a loss to understand.

The article mentions another circumstance, which whether true or false, must exceedingly prejudice the respondent, and yet has no just bearing on the case. It is said the respondent told Ware, that if he would pay this fee, the "overseers need know nothing about it." Now, sir, what had the overseers to do with this?—no more than the town crier. Those parts of the account which consisted of expenses incurred in their neighborhood, were properly enough, though not necessarily, subjected to their examination. They had an interest in having the account right, and their approbation was a convenient voucher. But what had they to do, with the propriety of the guardian's taking legal advice, for the benefit of his ward? They could not judge of it, nor were they to approve or disapprove his charge for obtaining such advice. Why, then, I ask, sir, was this observation about the overseers introduced, not only as evidence, but into the body of the charge itself, as making a part of that charge? What part of any known legal offence does that observation, or others like it, constitute? Nevertheless, sir, this has had its effect, and, in my opinion, a most unjust effect.

I will now, sir, beg leave to make a few remarks on the evidence adduced in support of this article. Of those facts, which I have thought alone material, there is no doubt, nor about them any dispute. It is true, that the respondent gave the advice, and received the fee, and allowed it in the account. If this be guilt, he is guilty. As to every thing else, in the articles—as to all those allegations, which go to degrade the respondent, and in some measure affect his reputation, as a man of honor and delicacy, they rest on Ware, and on Ware alone. Now, sir, I only ask for the re-



spondent the common advantages allowed to persons on trial for alleged offences. I only entreat for him from this court the observance of those rules which prevail on all other occasions, in respect to the construction to be given to evidence, and the allowances which particular considerations render proper.

It is proved, that this witness has had a recent misunderstanding with the respondent, and that he comes forward, only since that misunderstanding, to bring this matter into public notice. Threats of vengeance, for another supposed injury, he has been proved to have uttered more than once. This consideration alone, should lead the court to receive his evidence with great caution, when he is not swearing to a substantial fact, in which he might be contradicted, but to the manner of a transaction. Here is peculiar room for misrepresentation, and coloring, either from mistake or design. What a public officer does, can be proved; but the mere manner, in which he does it, every word he may say, every gesture he may make, cannot ordinarily be proved; and when a witness comes forth, who pretends to remember them, whether he speaks truth or falsehood, it is most difficult to contradict him. It is in such a case, therefore, that a prejudiced witness should be received with the utmost caution and distrust.

There is, sir, another circumstance of great weight. This is a very stale complaint. It is now nearly six years, since this transaction took place. Why has it not been complained of before? There is no new discovery. All that is known now, was known then. If Ware thought of it then, as he thinks of it now, why did he not complain then? What has caused his honest indignation so long to slumber, and what should cause it to be roused only by a quarrel with the respondent?

Let me ask, sir, what a grand jury would say to a prosecutor, who, with the full knowledge of all the facts, should have slept over a supposed injury for six years, and should then come forward to prefer an in-



dictment? What would they say, especially if they found him apparently stimulated by recent resentment, and prosecuting, for one supposed ancient injury, with the heat and passion excited by another supposed recent injury? Sir, they would justly look on his evidence with suspicion, and would undoubtedly throw out his bill. Justice would demand it; and, in my humble opinion, justice demands nothing less on the present occasion.

But, sir, there is one rule of a more positive nature, which I think applicable to the case; and that is, that a witness, detected in one misrepresentation, is to be credited in nothing. This rule is obviously founded in the plainest reason, and it would be totally unsafe to disregard it. Now, if there be any one part of Ware's testimony, more essential than all the rest, as to its effect in giving a bad appearance to the respondent's conduct, it is that in which he testifies that the respondent volunteered, in the case, and offered his advice before it was asked. This is a most material part of the whole story; it is indispensable to the keeping of the picture which the learned managers have drawn. And yet, sir, in this particular, Ware is distinctly and positively contradicted by Grout. Now, sir, if we were in a court of law, a jury would be instructed, that if they believed Ware had wilfully deviated from the truth, in this respect, nothing which rested solely on his credit would be received as proved. We ask for the respondent, in this, as in other cases, only the common protection of the law. We require only that those rules, which have governed other trials, may govern this; and, according to these rules, I submit to the court, that it cannot and ought not to convict the respondent, even if the facts sworn to would, if proved, warrant a conviction, upon the sole testimony of this witness. Even if we were sure that there were no other direct departure from the truth, yet, in the whole of his narrative, and the whole of his manner, we see, I think, indications of great animosity and prejudice. If the whole of this transaction

were to be recited by a friendly, or a candid witness, I do not believe it would strike any body as extraordinary. Any mode of telling this story, which shall confine the narrative to the essential facts, will leave it, in my humble opinion, if not a strictly proper, yet by no means an illegal or impeachable transaction. Let it be remembered, that a great part of his story is such, as cannot be contradicted, though it be false, inasmuch as it relates to alleged conversations between him and the respondent, when nobody else was present. Wherever the means naturally exist of contradicting or qualifying his testimony, there it is accomplished. Whatever circumstance can be found bearing on it, shows that it is in a greater or less degree incorrect. For example, Ware would represent that it was an important part of this arrangement to keep the payment of the fee from the knowledge of the overseers. This was the reason why the charge was to be inserted in the existing account, by interlineation. Yet the evidence is, that a complete copy of this very interlined account was carried home by Ware, where the overseers could see it, and would, of course, perceive exactly what had been done. This is utterly inconsistent with any purpose of secrecy or concealment.

Making just and reasonable allowances, for the considerations which I have mentioned, I ask, is any case proved, by the rules of law, against the respondent? And further, sir, taking the facts only which are satisfactorily established, and supposing the respondent's conduct to have been wrong, is it clearly shown to have been intentionally wrong. If he ought not to have given the advice, is it any thing more than an error of judgment? Can this court have so little charity for human nature, as to believe that a man of respectable standing, could act corruptly for so paltry an object? Even although they should judge his conduct improper, do they believe it to have originated in corrupt motives? For my own part, sir, notwithstanding all that prejudices and prepossessions may



have done, and all that the most extraordinary manner of presenting this charge may have done, I will not believe, till the annunciation of its judgment shall compel me, that this court will ever convict the respondent upon this article.

I now beg leave to call the attention of the court to one or two considerations of a general nature, and which appear to me to have an important bearing on the merits of this whole cause. The first is this, that from the day when the respondent was appointed judge of probate, down to the period at which these articles of impeachment close, from the year 1805 to 1821, there is not a single case, with the exception of that alleged by Ware, in which it is even pretended that any secrecy was designed or attempted by the respondent: there is not a single case, in which he is even accused of having wished to keep any thing out of sight, or to conceal any fact in his administration, any charge which he had made, or any fee which he had taken. The evidence, on which you are to judge him, is evidence furnished by himself; and instead of being obliged to seek for testimony in sources beyond the respondent's control, it is his own avowed actions, his public administration, and the records of his office, which the managers of the prosecution alone have been able to produce. And yet he is charged with having acted wilfully and corruptly, as if it were possible that a magistrate, in a high and responsible station, with the eyes of the community upon him, should, for near twenty years, pursue a course of corrupt and wilful maladministration, of which every act and every instance was formally and publicly put on record by himself, and laid open in the face of the community. Is this agreeable to the laws of human nature? Why, sir, if the respondent has so long been pursuing a course of conscious, and wilful, and corrupt maladministration, why do we discover none of the usual and natural traces of such a course; some attempt at concealment, some effort at secrecy; and in all the numberless cases, in which he had opportunity and temp-



tation, why is not even a suspicion thrown out, that he has attempted to draw a veil of privacy over his alleged extortions? Is it in reason that you should be obliged to go to his own records for the proof of his pretended crimes? And can you, with even the color of probability, appeal to a course of actions unsuspiciously performed in the face of heaven, to support an accusation of offences in their very nature private, concealed and hidden?

Another consideration of a general nature, to which I earnestly ask the attention of this honorable court, is this; that after all these accusations, which have been brought together against the respondent, in all these articles of impeachment, and with all the industry and zeal, with which the matter of them has been furnished to the honorable managers, he is not accused nor was suspected of the crime, most likely to bring an unjust judge to the bar of this court. Show me the unjust judgment he has rendered, the illegal order he has given, the corrupt decree he has uttered, the act of oppression he has committed. What, sir, a magistrate, charged with a long and deliberate perseverance in wilful and corrupt administration, accused of extortion, thought capable of accepting the miserable bribe of a few cents or a few dollars, for illegal and unconstitutional acts; and that, too, in an office, presenting every day the most abundant opportunities, and, if the respondent were of the character pretended, the most irresistible temptation to acts of lucrative injustice; and yet, not one instance of a corrupt, illegal or oppressive judgment! I do ask the permission of this honorable court, and of every member of it, to put this to his own conscience. I will ask him, if he can now name a more able and upright magistrate, as shown in all his proceedings and judgments, in all the offices of probate in the state? One whose records are more regularly and properly kept, whose administration is more prompt, correct and legal; whose competency to the duties is more complete, whose discharge of them is more punctual? I put this earnest-

ly, sir, to the conscience of every member of this honorable court. I appeal more especially to my honorable friend, (Mr. Fay,) entrusted with a share of the management of this prosecution, and who has been for twenty years an inhabitant of the county of Middlesex. I will appeal to him, sir, and I will ask him, whether if he knew, that this night his wife should be left husbandless, and his children fatherless, there is a magistrate in the state, in whose protection he had rather they should be left, than in that of the respondent? Forgetting, for a moment, that he is a prosecutor, and remembering only that he is a citizen of the same county, a member of the same profession, with an acquaintance of twenty years standing, I ask him if he will say that he believes there is a county in the state, in which the office of judge of probate has been better administered for twenty years, than it has been in the county of Middlesex, by this respondent? And yet, sir, you are asked to disgrace him. You are asked to fix on him the stigma of a corrupt and unjust judge, and condemn him to wear it through life.

Mr. President, the case is closed. The fate of the respondent is in your hands. It is for you now to say whether, from the law and the facts as they have appeared before you, you will proceed to disgrace and disfranchise him. If your duty calls on you to convict him, convict him, and let justice be done! but I adjure you let it be a clear, undoubted case. Let it be so for his sake, for you are robbing him of that, for which with all your high powers, you can yield him no compensation; let it be so for your own sakes, for the responsibility of this day's judgment is one, which you must carry with you through your lives. For myself, I am willing here to relinquish the character of an advocate, and to express opinions by which I am willing to be bound, as a citizen of the community. And I say upon my honor and conscience, that I see not how, with the law and constitution for your guides, you can pronounce the respondent guilty. I declare, that I have seen no case of wilful and corrupt official mis-



conduct, set forth according to the requisition of the constitution and proved according to the common rules of evidence. I see many things imprudent and ill-judged; many things that I could wish had been otherwise; but corruption and crime I do not see. Sir, the prejudices of the day will soon be forgotten; the passions, if any there be, which have excited or favored this prosecution, will subside; but the consequence of the judgment you are about to render will outlive both them and you. The respondent is now brought, a single unprotected individual, to this formidable bar of judgment, to stand against the power and authority of the state. I know you can crush him as he stands before you, and clothed as you are with the sovereignty of the state. You have the power "to change his countenance and send him away." Nor do I remind you that your judgment is to be rejudged by the community; and as you have summoned him for trial to this high tribunal, you are soon to descend yourselves from these seats of justice, and stand before the higher tribunal of the world. I would not fail so much in respect to this honorable court, as to hint that it could pronounce a sentence, which the community will reverse. No, sir, it is not the world's revision, which I would call on you to regard; but that of your own consciences when years have gone by, and you shall look back on the sentence you are about to render. If you send away the respondent, condemned and sentenced, from your bar, you are yet to meet him in the world, on which you cast him out. You will be called to behold him a disgrace to his family, a sorrow and a shame to his children, a living fountain of grief and agony to himself.

If you shall then be able to behold him only as an unjust judge, whom vengeance has overtaken, and justice is blasted, you will be able to look upon him, not without pity, but yet without remorse. But, if, on the other hand, you shall see whenever and wherever you meet him, a victim of prejudice or of passion, a sacrifice to a transient excitement; if you shall see in



him, a man, for whose condemnation any provision of the constitution has been violated, or any principle of law broken down; then will he be able—humble and low as may be his condition—then will he be able to turn the current of compassion backward, and to look with pity on those who have been his judges. If you are about to visit this respondent with a judgment which shall blast his house; if the bosoms of the innocent and the amiable are to be made to bleed, under your infliction, I beseech you to be able to state clear and strong grounds, for your proceeding. Prejudice and excitement are transitory, and will pass away. Political expediency, in matters of judicature, is a false and hollow principle, and will never satisfy the conscience of him who is fearful that he may have given a hasty judgment. I earnestly entreat you, for your own sakes, to possess yourselves of solid reasons, founded in truth and justice, for the judgment you pronounce, which you can carry with you, till you go down into your graves; reasons, which it will require no argument to revive, no sophistry, no excitement, no regard to popular favor, to render satisfactory to your consciences; reasons which you can appeal to, in every crisis of your lives, and which shall be able to assure you, in your own great extremity, that you have not judged a fellow-creature without mercy.

Sir, I have done with the case of this individual, and now leave him in your hands. But I would yet once more appeal to you as public men; as statesmen; as men of enlightened minds, capable of a large view of things, and of foreseeing the remote consequences of important transactions; and, as such, I would most earnestly implore you to consider fully (of) the judgment you may pronounce. You are about to give a construction to constitutional provisions, which may adhere to that instrument for ages, either for good or evil. I may perhaps overrate the importance of this occasion to the public welfare; but I confess it does appear to me that if this body give its sanction to some of the principles which have been advanced on this

occasion, then there is a power in the state above the constitution and the law; a power essentially arbitrary and concentrated, the exercise of which may be most dangerous. If impeachment be not under the rule of the constitution and the laws, then may we tremble, not only for those who may be impeached, but for all others. If the full benefit of every constitutional provision be not extended to the respondent, his case becomes the case of all the people of the commonwealth. The constitution is their constitution. They have made it for their own protection, and for his among the rest. They are not eager for his conviction. They are not thirsting for his blood. If he be condemned, without having his offences set forth, in the manner which they, by their constitution have prescribed; and proved, in the manner which they, by their laws have ordained, then not only is he condemned unjustly, but the rights of the whole people disregarded. For the sake of the people themselves, therefore, I would resist all attempts to convict by straining the laws, or getting over their prohibitions. I hold up before him the broad shield of the constitution; if through that he be pierced and fall, he will be but one sufferer, in a common catastrophe.

END OF VOLUME IV.









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